its conceivable that in heavy fabrics somebody might wear it as an outer shirt.

Q. Well in the Navy Nurses use of it it was an outer garment was it not? A. I frankly don't know. We made it in cotton for their summer uniforms and in wool for their winter uniforms. Whether they wore a jacket over it I can't answer that.

Q. Now it is a fact is it not that you have instituted five suits on these patents? A. I think that's the correct number.

Q. And it is a fact is it not that all of those suits or actions are against dealers, rather than manufacturers, isn't that so?

Judge Marx: Well I object, if Your Honor please, as having no materiality.

Judge Druffel: Well he may answer yes or no if you know.

A. Well I think they are all in the classification of what you'd call dealers, or retail stores.

Q. And do you know who the manufacturers are who manufacture the particular structure charged to infringe in each of those suits? A. Not without reference to the papers.

Q. Well when you testified about competition you had reference to the shirts charged to infringe in the other suit as well as the shirt charged to infringe in this particular suit did you not?

Judge Marx: No we were prevented from going into that by objection on the other side. Your Honor limited that. I merely want to point out it opens the door that was closed by the other side.

Mr. Horton: If the testimony and proofs can be so restricted I'd certainly be glad to accept it but the gentleman

that was here from Baskins stores certainly testified as to competition of——

Judge Marx: He was telling about the competition of the Corsair shirt.

Judge Druffel: No I think the plaintiff here is limited to the issues here, but the Marlboro witness and the Baskin, is it Baskin.

Mr. Horton: Baskin Stores.

Judge Druffel: How do you spell it?

Mr. Horton: B a s k i n.

Judge Druffel: Baskin. Well he testified that the competition came from a number of directions. Is that what you want.

Mr. Horton: That's the whole purpose of this inquiry.

Judge Druffel: All right.

The Witness: Will you restate your question now please? By Mr. Horton:

Q. That competition that you referred to and that was referred to by these other witnesses is the competition by the other manufacturers of the shirts charged to infringe in the other actions as well as that charged to infringe in the present action, isn't that true? A. I would say yes.

Q. Mr. Brohard isn't it true that the business in expensive luxury items at the present time has fallen off generally? A. I don't know that I could make that general statement.

Q. Well do you still make the Cavu shirt in the $25.00 model? A. I do.

Q. Is that sold at that price still? A. We are selling our wool Cavu Tailspins at the same price today that we sold them a year ago.

Q. And what was that? A. Depending upon the quality of the gabardine of which they are made they range

from $10.50 in one grade per shirt wholesale to $17.00 per shirt wholesale.

Q. And has there been any falling off in the more expensive shirt, as compared with the less expensive shirt? A. I wouldn't say that the degree of fall-off has been any more pronounced in the better shirts than it has in the cheaper shirts.

Q. Have you made any analysis of the figures on that? A. No I haven't, except as just a brief scanning, or perusal of the facts that I have.

Q. Now with respect to the Brohard shirt shown in the design patent, does that differ from conventional shirts in any way other than the location of the zipper, and the provision of a plain unbroken bib when worn under a jacket? A. Your question is does the Tailspin shirt of my design, my design patent, differ from a conventional shirt in any other way other than the location of the zipper, and what else?

Q. And the provision of this plain unbroken bib front when worn under a coat? A. Well of course in a design patent the only element is, as it strikes my opinion, there are no other deviations aside from an occasional change of the pockets or the cuffs, but the general impression to me is that the most important features in my design patent would be the location of the zipper and the plain front.

Q. Now with respect to your mechanical patent, in what respects does the shirt shown and described in that patent, differ from the conventional shirts? A. I think you'd have to specify with which conventional shirt you want me to compare it, because in the mechanical patent there are several claims on which I can make a comparison. And those claims might differ.

Q. Well there is only one claim if you're getting technical. A. Well I'm prepared to be technical because I

know that patent and whatever shirt you want me to compare it with I shall be glad to point out the differences.

Q. Well what elements of novelty are there in the shirt described in your mechanical patent, other than the location of the zipper and the provision of a plain unbroken bib front?

Judge Marx: Now if Your Honor please the patent is before Your Honor, the sample is before Your Honor and the claim in its entirety, the garment in its entirety. Now it is for Your Honor to determine, the witness has frankly said that if they would show him the conventional shirt that he would be very glad to point out the differences, but all shirts are not the same.

Judge Druffel: Well can we define the conventional shirt, I don't see that there should be any——

Mr. Horton: Well he was very able to do this on direct examination.

Judge Druffel: Yes, I know. Now the conventional shirt is the buttons down the front is that right?

Judge Marx: If he wants to take this shirt here which is an exhibit and which does button down the front as Your Honor said and compare it we haven't any objection to him doing it.

Mr. Horton: It isn't what I asked him.

Judge Druffel: No, what he's trying to do is narrow the issue here as I see it, is that right?

Mr. Horton: Yes sir, I'm asking him now to state what items of novelty there were in his opinion between the shirt described and claimed in his mechanical patent and the shirts that went before them?

Judge Marx: Well that's the trouble, the shirts that went before them. The shirts that went before it were a legion but they were all different.

Mr. Horton: Well I've asked him whether there is any item of novelty in the shirt described in claim in his mechanical patent that he asserts to be items of novelty in there, other than the provision of the zipper in the diagonal opening, and the provision of a plain bib front when the shirt is worn underneath a coat.

The Witness: I answered that on the design patent.

Mr. Horton: And I'm asking you now whether there are any other items of novelty than those with respect to the mechanical patent.

Judge Marx: Now our objection is that his claims are set forth in the patent, and if you read that claim as an entirety it speaks for itself, but if he wants to compare them with some conventional shirt, claiming that there is no difference or the differences are slight, why we have no objection to him taking any shirt and exhibiting it to the witness and he'll make a comparison.

Mr. Horton: Well he was very able to do this on direct examination and I can't see——

Judge Marx: Well we took the claims of the patent and compared it to the Cavu shirt.

Judge Druffel: We're wasting time, take your coat off please if you want to do that or just open your vest and show them your's and if you want to call that a conventional shirt——

Mr. Horton: Well I haven't a conventional sport shirt.

Judge Druffel: Well all right, take this one then.

Judge Marx: The blue one.

Mr. Horton: That isn't the question, Your Honor.

Judge Druffel: I understand what you're trying to do. The question is you want this witness under cross examination to point out the differences in his patented, in his mechanical patent over the conventional shirt that is buttoned down the front.

Mr. Horton: I want him to point out the items of novelty.

The Witness: I was willing to do that for you on the design patent, but the reason I don't want to do that for you on the mechanical patent is because your comparison of my shirt with the conventional shirt is too loose a description, there are T-shirts, sweat shirts, underwear shirts, dress shirts, formal shirts, all of which open differently than the Tailspin. That would be a laborious thing to make comparisons with all those because it would take all afternoon. I'm qualified to do it if you so desire.

By Mr. Horton:

Q. Well I understood you to say on direct examination, that the elements of novelty as shown and described in the mechanical patent were the provision of a zipper which came up under the collar, dropped off diagonally to the hip? A. Right.

Q. And with an opening below that. That was one thing which you thought was new. The other thing which I thought that you said was new, as far as that patent was concerned, was the provision of a plain unbroken bib front when you wore a coat over that shirt. Is that true?

Judge Marx: If Your Honor please, our objection is a very solid legal objection, and that is that the claims the inventor makes are set forth in his patent, and that claim is to be read as a whole, and that is what is his claim as to what is new and patented.

Judge Druffel: Well I don't think that your objection is well taken that he can't take the claim apart and cross examine him.

Judge Marx: Well he can take the claim apart, that's all right. But he isn't doing it that way.

Judge Druffel: One of the features of the claim was——

Judge Marx: Your Honor's suggestion was very excellent that he take the shirt and point out wherein there is any difference in his claims of invention from this shirt.

Mr. Horton: Well that's quite a different subject there.

Judge Marx: He won't do that because he knows that this is new——

Mr. Horton: That's quite a different subject then.

Judge Marx: ——and that the comparison will merely emphasize the novelty, so he don't want a comparison.

Judge Marx: Well let's ask the direct question, he did claim that the solid front here has some qualities that prevented the wearer from catching cold when he gets the propblast, an so on, that's one of your claims isn't it?

The Witness: Well the wording of the patent is not such. The patent wording states that the one front extends beyond the center line thus creating a plain front, does that answer your question?

Mr. Horton: Well partially.

Q. There is nothing in the patent about this protection against propeller wash is there? A. Not as I recall.

Q. Is there any element of novelty that you have in mind with respect——

Judge Marx: I'm doubtful of the question, I was listening to one of my colleagues for a minute, but I offer my objection on the ground that what is contained in the patent speaks for itself. Your Honor, will interpret the patent.

Mr. Horton: Well of course if we were going to do that we'd have to strike out a good deal of this direct examination.

Judge Druffel: Yes you see that's the question you see.

Judge Marx: Well then he should have objected on that ground.

Mr. Horton: I did.

Judge Marx: I don't recall any objection on that ground, if Your Honor please. If counsel had an objection to any part of the direct examination on that ground he should have made one but he didn't. And what objections he made Your Honor largely sustained.

Judge Druffel: Well the witness did describe at length the value of the solid bib front there as a protection against the cold.

Judge Marx: Now that's something else, he was describing the utility of it and the advantages of it and so on. But he's now asking him about what his claims are in the patent.

Judge Druffel: He hasn't been asking that.

Judge Marx: Well that's what he's driving at, Your Honor, he may conceal his thoughts but——

Mr. Horton: Well you're guessing wrong, Judge.

Judge Marx: No I am not guessing wrong.

Mr. Horton: Yes you are.

The Witness: Well I interpret it that you are asking me about the claims in the patent.

Mr. Horton: No I wasn't.

The Witness: Sorry.

Judge Druffel: All right, next question.

By Mr. Horton:

Q. All right now, let's go back. Is there any item of novelty that you have in mind as shown and described in your mechanical patent in suit, other than those two features of the location of the zipper and the provision of the plain bib front? A. Yes.

Q. What? A. The fact that the upper terminus of the zipper forms a point as which both fronts meet at one side of the center, whereas on most conventional garments

that have a two-piece front, one flap overlaps the other one, by at least a little bit, in double breasted garments more.

Q. Well now isn't it true in your patent 2428198 that the corner of this portion of the front near the numeral 19 would overlap this portion of the other side of the front near the numeral 18? A. This point is not considered a part of the front; this portion is considered to meet at this point right here.

Judge Marx: Don't say this point and so on, pointing, can you identify the lines by numbers?

Judge Druffel: He said 18 and 19.

Judge Marx: Well then in his answer he said this point and this point.

Q. And when you said this point you referred to 18 did you not? A. No, 18 is not the point at which these two points meet.

Q. Where does this front corner near the numeral 19, touch the other side of the front? A. It touches the other side of the front at an unmarked point that we'll mark mark number 50.

Q. Well now you've marked it number 50 at the location of part of the zipper, isn't that true? A. That's true the two fronts meet.

Q. Right at that zipper point? A. Right here.

Q. And that's slightly to the left of the numeral 18 in figure 4, is that true? A. Yes, on the line 15.

Q. Now when that, when those points meet, the front on the right hand side of Figure 4 overlaps this section 31, does it not? A. That's section 31, it does overlap.

Q. Then I don't think I understand what distinction you made on this point of novelty that you are now pointing out, was that feature new, the fact that it does overlap.

A. You just asked me for an additional feature and I gave you one. I don't know how to make it any clearer, without taking off my shirt again.

Q. You won't have to do that.

Judge Druffel: Why don't we take a recess at this point?

(Short recess.)

By Mr. Horton:

Q. Mr. Brohard, with reference to the shirt described and claimed in your mechanical patent in suit, is there any other point of novelty in and about that shirt that you have in mind other than those that you have mentioned? A. Do you mind if I read them?

Q. No. A. An object of this invention is to provide a garment construction which is——

Q. Well now are you answering my question by reading the patent? A. Yes sir.

Q. Well I'm asking you if you have it in mind, any element of novelty, other than the three which you have mentioned? A. Well, I understand that the things I can claim are in this patent, and the objects which we attempted to perform when we made this shirt.

Q. Yes, and your counsel can point to the patent—— A. That's true.

Q. I'm asking you what you have in mind? A. The only thing that remains is that——

Judge Marx: It isn't what he has in mind, its what is contained in the patent.

Mr. Horton: Well he brought out some of the——

Judge Marx: We are willing to have his attention directed to anything contained in the patent.

Mr. Horton: I think that that's a matter which could certainly be handled on redirect, if necessary.

Judge Marx: That's a matter of memory, of course a good fellow that's been an actor could memorize a part in

a play he could memorize the patent and recite it by heart, but he hasn't that kind of a memory, and if he can't he can read it, he can refresh his memory from it.

Mr. Horton: It isn't going to exclude it from the patent if he doesn't mention it.

The Witness: No I just don't want to be embarrassed by having to relate things that my memory keeps me from remembering.

Q. Well on direct examination there were a good many things which we heard of what he said were novel and unique about this shirt, and he didn't read from the patent at that time. There were some things that we had heard about that were not in the patent, and I'm asking now if he has in mind any item of novelty in and about the shirt described and claimed in this mechanical patent suit, other than what may be stated in the patent itself.

Judge Druffel: I wonder if we couldn't reach it this way. You know what he testified to on direct, and you are familiar with the claims of the patent, now why not make it cross examination if that's what you want and ask him the direct question where you think there is any discrepancy.

Mr. Horton: Well I intend to go to the claim. Now what I am asking him now is whether he has any items of novelty about this patent shirt described and claimed in his patent other than what is stated in the patent itself, and other than those he has already enumerated.

Judge Druffel: Well we're making no progress fast. You remembered everything good about the shirt when you testified directly, didn't you?

The Witness: Yes sir.

Judge Druffel: Now you know.

The Witness: The shirt gives a streamlined appearance, that object does not appear in there.

By Mr. Horton:

Q. Did you mention all of those items of novelty on your direct examination? A. I don't remember what I did on my direct examination.

Q. Well let's go to the claim. Now this claim calls for a garment comprising a front and back. Now many shirts have a front and a back, do they not? A. True.

Q. It says terminating in an upper neckline, now that's common of many conventional shirts is it not? A. Common with many, yes sir, but not all.

Q. But of many? A. Right.

Q. A fold-over collar, that's common too, to many shirts is it not? A. We get to comparative degrees and I don't know whether I am entitled to use the word many.

Q. Well its common in some shirts is it not? A. All collars are not fold-over.

Q. In some shirts is it not? A. Some is all right.

Q. Shown in defendant's Exhibit C is it not? A. That's a fold-over collar.

Q. And that fold-over collar attached at said neckline, that's common is it not, to fasten the fold-over collar at the neckline? A. I think it is pretty common, yes.

Q. And having flat portions overlying said front on opposite sides of the vertical center line of the front. A. True.

Q. Now that's common isn't it? And having the ends of the lines afold thereof meeting at the vertical center line of the front, that's common is it not? A. No.

Q. For a collar to have the center lines meeting at the vertical center lines of the front? A. The way this claim is worded that means the—I can show you better on the drawing, you see this is the fold line of the collar, line 21, not all collars have this point 18 and 19 which meet, and the majority of collars do not meet there.

Q. Defendant's exhibit C has the ends of the lines of fold thereof meeting at the vertical center line of the front. A. That's an expensive shirt.

Judge Druffel: Now listen, let's do it this way, answer directly yes or no if it requires any explanation then give it.

The Witness: It does.

Judge Marx: Now you can explain.

Judge Druffel: If there is any explanation, he can explain if there is any explanation. All right, let's go.

By Mr. Horton:

Q. Well it says said front comprising two portions, now the front of Exhibit C has two portions does it not? A. That's true.

Q. One of said portions extending at the neckline across the vertical center line of the front and terminating beneath the flap of said collar. Now that's true of Defendant's Exhibit C is it not? A. Is this Exhibit C?

Q. Yes. A. Yes.

Q. Said other portions terminating on said neckline beneath said flap at the point of termination of the first mentioned portion, is that common? A. No.

Q. Is that true of Defendant's Exhibit C? A. No.

Q. Is that one of the points of novelty—— A. Hold on just a minute, we are at line 8 in this thing, are we?

Q. Yes. A. Said other portion terminating on said neckline beneath said flap at the point of termination of the first mentioned portion, that is not true on that shirt.

Q. What is that feature as shown in the drawing? A. That's the feature I pointed to you just a minute ago, point 50. It isn't marked on there.

Q. That's at the point of intersection of the zipper line with the line 15? A. Right.

Q. Now there is in Figure 4 a portion extending to the right beyond that point is there not? The flap? The element 31? A. Not in Figure 4.

Judge Druffel: Well that's figure 3 and 4. I think you ought to refer to Figure 3 and 4.

Q. Figure 3, you are correct. That does extend to the right at that point, does it not? A. Yes sir.

Q. Said two front portions, having meeting edges, extending diagonally from said point of meeting of said portions at the neckline—— A. Pardon me, I'm behind here I can't find out where you are.

Q. Line 10 now. A. Yes sir.

Q. Said two front portions, having meeting edges, extending diagonally from said point of meeting of said portion at the neckline, aforesaid, toward the hip of the wearer located on the same side of the verticle center line of the front, as is said point. Now is that a point of novelty in your shirt? A. Yes.

Q. You don't know of any other shirt or jacket that has that feature? A. No.

Q. And a slide fastener for securing said meeting edges along said diagonal line, now a slide fastener is not new is it? A. No.

Q. A slide fastener for securing said meeting edges along said diagonal line, new? A. To my knowledge.

Q. The upper terminus of said slide fastener, lying beneath said collar flap, so as to be concealed thereby, now is that feature new? A. To my knowledge, it's new.

Q. And the front of the garment between the flaps of the collar being unbroken by said diagonally meeting edges, now is that new? A. As far as I know that's new.

Mr. Horton: That's all.

Judge Marx: Call Mr. Mack.

Whereupon,

Richard J. Mack

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Judge Marx:

Q. Will you state your full name? A. Richard J. Mack.

Q. Where do you live? A. 4220 Rosehill Avenue, Cincinnati.

Q. How long have you lived here? A. All my life.

Q. And how old are you? A. 48.

Q. Are you related to the former Judge Julian Mack? A. He's an uncle, was an uncle.

Q. Your father's brother? A. Yes sir.

Q. What position do you occupy with the Mack Shirt Company? A. President.

Q. And how many years have you been engaged in the shirt business? A. Since 1924, twenty-five years.

Q. What field of business does the Mack Shirt Company engage in? A. Manufacturing and distributing of men's shirts, and sports shirts.

Q. How many years have you been engaged in that business? A. Since 1897—fifty-one years, fifty-two years.

Q. And where has its factory been located? A. We've always been located in Cincinnati, and we've been continuously manufacturing shirts for over a half a century.

Q. You hold a license from Cavu Clothes that has been introduced here in evidence? A. Yes sir.

Q. Will you relate how you first became acquainted with the patented shirt made by Cavu Clothes. A. Start from the beginning?

Q. Yes.

Judge Druffel: Well I'll tell you you can bring it right down to scratch because this is cumulative anyhow, all the others have——

Judge Marx: Well I would do that, but I would like because it bears upon the design patent——

Judge Druffel: Well that's all right, but he says Do you want to go from the beginning, I'd——

The Witness: Well briefly we became aware of this shirt through a retail friend who had bought one of the original Cavu shirts and we immediately saw its novelty, and became interested and approached Mr. Montie Brohard with a suggestion that we be authorized or licensed to sell the shirt, which then had a patent pending, under a trial agreement, we had no facilities then for manufacturing the patented shirt. We did reach this agreement after submitting it to various members of our manufacturing organization who have been shirtmakers, cutters and designers for a period of years, asking them whether they saw anything different to which they replied in the——

Mr. Horton: I object to the conversation.

Judge Druffel: The conversation, yes.

Q. Did you see the shirt yourself? A. I originally saw the shirt and was impressed with its possibilities, and I personally approached Mr. Brohard.

Q. You told us that. Now did you see the shirt worn by anybody? A. I originally saw the shirt worn on a train and stopped to look around and see what the shirt was, because being a shirtmaker and being conversant with the different styles it was directed to my attention immediately, and I in fact identified Mr. Brohard and I telegraphed to find out where he was stopping in New York, without hesitation so that I could immediately make contact with him, before he left New York City.

Q. That's detail enough. When you saw the shirt what impression did it make on you in reference to style and design, and appearance? A. That it was different.

Q. Different from what? A. Different from anything that I had seen and as a shirt man I took particular notice that it had no center opening and that it had a dramatic appearance, it was unusual.

I spoke to Mr. Brohard about this trial agreement——

Q. Now I'll ask you about that separately let's stay with the appearance first. Had you made it your business to look at all styles of sports wear and sports shirts that come on the market commercially during your association with the shirt industry?

Mr. Horton: Well I object to that as a conclusion on an all-inclusive question of that kind.

Judge Marx: Well it obviates, it's leading I admit but it obviates a lot of time.

Judge Druffel: All right.

A. It is my responsibility in the business in which I am associated to observe and study and look at all kinds of shirts in retail stores.

Q. And had you ever seen anything previous like this shirt? A. Not in my life, no.

Q. Well then you did make, made this trial order is that—— A. No, we discussed the matter of a trial agreement under which we would sell this shirt to our established customers and it was to be manufactured under a contract of the Brohard Rainer Shirt Corporation. We're conservative and we don't jump into things as quickly, as a rule, we're an old line concern and we perhaps have taken a conservative, almost hesitant point of view about going into new ideas. There are many ideas that are submitted to me personally, and some are patented and some

are just suggestions and creative thinking along lines of new ideas, I perhaps have seen several hundred in my business experience and that have been submitted by men who have an idea of something different in making a shirt, and I'm sure because of that we are on the side of being hesitant rather than being impulsive in picking up an invention.

Q. What was your experience with this shirt when you tried it out, in this conservative fashion? A. Well I took the shirt to several leading retail accounts, men whom I knew and whose judgment I respected, and Mr. Urban Guckes who is Vice-President of our Company and is responsible for our distribution, did likewise. For the purpose of ascertaining what was their opinion of the garment. May I state the reaction of these——

Mr. Horton: Well I object to any statement of their opinion.

Q. Well what was their reaction as far as commercial, I don't mean their reaction as far as liking it or not liking it, I mean their reaction as far as buying it? A. They felt that it had commercial possibilities and in particular encouraged us to go forward with the plan which we had in mind.

Q. Did you do so? A. Yes we did so with all possible dispatch.

Q. What success commercially did you meet with in marketing this product? A. We brought out an initial line which we offered in a cautious manner, feeling that it would be well——

Mr. Horton: Well I object to him stating about his feelings I think he's—a cautious manner——

Q. Well I would like you to come down to a point of what the commercial success was. How your orders went

from there on. A. The commercial success was terrific because from the moment that we allowed retailers to place orders, and we were offered more orders than we felt possible to accept and enter.

Q. Now at the time you brought this shirt out in your company what was the state of the market with reference to the so-called conventional or other sport shirt? A. This was in the fall of 1946 that we brought the shirt out, by that time there was a gradual change from the wartime business on conventional shirt; while business was active generally there was a growing decline in the demand for the conventional sport shirt of this type of fabric. That became much more pronounced during the following six months, at which time the Flightmaster, which is our brand of the Cavu style shirt increased rapidly and our commercial success was unquestionably evident and established in our minds. I recall drawing a budget for the fall of 1947, predicated upon our experience and our judgment of the spring of '47, and the figures which we budgeted for the fall conveyed our belief and feeling that this garment was established and that the public reception had been very great—that had been something in the history of our company which we had never known before. We are used to shirts as more or less staple things and there just was nothing, nothing had ever taken hold with the rapidity of this Flightmaster shirt.

Q. At the same time what were your sales of your conventional sport shirts that you made, did they also increase in like proportion? A. I believe they were about stationary, they didn't decline at that time. But they did not increase, and there was a period of slowing down in the conventional sports shirts, particularly those of the same type of materials which we used——

Q. Well what type of material did you use? A. We used spun rayon gabardine, and rayon and acetate gabardine which is a similar construction or fabric, and we used the corduroy.

Q. Well now have you got your sales records available? A. Yes sir.

Q. Will you read into the record your sales, or summarize them, and we can hand the sales into the record. A. Our net sales for the fourth quarter of 1946 in units of dozens is 514.

Judge Druffel: In units of dozens that would be 514? Dozen?

The Witness: Dozen.

Q. Well how many shirts is that?

Judge Druffel: Well that's 514 dozen.

A. 514 dozen. The first quarter '47—1,046 dozen; the second quarter of '47—1057 dozen; the third quarter—1228 dozen and the fourth quarter 1574 dozen. The first quarter of '48, which was our largest period and these are figures of shipments not orders booked, was 3,058 dozen, then there was a decline, 2,338 dozen, for the third quarter it was 1475 dozen, and the fourth quarter was 2681 dozen.

Now during that same period the comparable long-sleeve sport shirt in the second half of '46 was over 10,300 dozen; the second half of '47 was only 4,083 dozen, so there was a decline of half the volume in long sleeved sports shirts, at the same period of rise in the sales of the Flightmaster shirt. The unquestioned difference of sales was in the acceptance not only of retailers but of the public of the shirts which we offered to ship in the new style.

Q. Now is, what is the present status of your business in Flightmaster? A. Our sales are not being maintained. We are selling modest quantities which will aver-

age, we've sold only 647 dozen as against 3,000 dozen in the first quarter of '48, and those are figures up to a week ago. If we double those sales it will only be 1200 or 1300 dozen against sales of a year ago of over 3,000 dozen. The retailers are afraid to buy this shirt——

Mr. Horton: I object to that statement and move to strike it.

Judge Druffel: Objection will be sustained.

Q. Well, are you familiar with, where does your company sell, what parts of the United States? A. The Mack Shirt Corporation sells in all states of the United States, and Hawaii and Central America. We have sold for at least twenty-five years, our distribution is national in scope.

Q. Are you familiar with the appearance in this market of shirts similar to the patented shirt made by competing shirt manufacturers without a license? A. I am sir.

Q. What shirt do you know appeared in this market similar to the patented shirt? A. To my knowledge the first shirt which appeared I saw it in Chicago with a Corsair label, by Spectator; I have also seen I would judge nine or ten other shirts which were sent to my office by customers of salesmen with other labels, Scallawag, Campus and other labels but of similar design and construction.

Q. Now I'll show you a shirt which has been sold here by Squires, Inc., and manufactured by the Spectator Sportswear, Inc., bearing the Corsair label and ask you as to design and appearance what if any difference there is between it and the patented shirt for which you hold the license.

Mr. Horton: I object to this witness being asked that question, I don't think he's qualified in any way.

Judge Marx: I don't know how you could qualify him any better.

Judge Druffel: His experience as a shirtmaker I think is sufficient. The question is what difference is there between the shirt that he has in his hand and the patented shirt in suit?

Judge Marx: Yes.

Q. Yes as to design and appearance, and mechanical construction. A. From my eye its an identical design, and the appearance is very similar. It has, the image which I carry away with me in looking at this shirt is exactly the same as the image which I carried away with me in looking at the original Cavu shirt which I saw on Mr. Brohard. Image of something that was distinct and unusual and that attracted my attention.

Q. Do you know whether Mr. Behr has on a shirt made by Corsair? A. I do not. Will you come up here a minute. No this isn't a Flightmaster.

Q. Well is that a Corsair shirt? Would you mind taking off your coat a minute? I'd like you to look at the comparison here of the shirt that Mr. Brohard has and the shirt that Mr. Behr is wearing; the grey one on Mr. Behr being a Corsair and the one Mr. Brohard is wearing being the other one and ask you what difference there is in their appearance and design, other of course than the difference in the pocket? A. The thing that strikes me as to the shirt is the unbroken effect in front. If I were to see these two men at a distance, and the color of the shirt were the same, and Mr. Brohard didn't have pencils in his pocket, excepting for the flap pocket tuck I would say they were identical.

Q. What, effect did these, the appearance and the sale of these shirts of similar design and appearance to the patented shirt have commercially in the market with reference to your ability to sell the patented shirt?

Mr. Horton: I object to that, Your Honor, I think that calls for a conclusion, the fact of course——

Judge Druffel: The sales are given here and there is a decline.

Judge Marx: Well I want to tie the two together, I don't know, I may have asked it awkwardly.

Mr. Horton: Well at most it would be an opinion of it.

Q. When, with reference to the decline in your sales did the appearance on the market commercially of a number of shirts that you have mentioned by Corsair and the others, which were similar in design and appearance to the shirt manufactured by you occur. A. It was coincidental. It was very definite that the result of the appearance on the market of similar shirts with diagonal zipper opening and unbroken front had a deteriorating effect upon the sales of our shirts.

Mr. Horton: I move to strike that. It's conclusion and opinion.

Judge Druffel: Well I think that the answer that the coincidental appearance of these other so-called infringing shirts with the decline of the sale that speaks for itself.

The Witness: I could bring you the evidence, statements, to bear that out.

Judge Marx: You may cross examine.

The Witness: Well I could bring statements to bear that out.

Judge Druffel: Well I think its sufficient for the purpose. All right, cross examination.

CROSS EXAMINATION

By Mr. Horton:

Q. You say that the appearance of this shirt charged to infringe and the decline in your sales occurred coinci-

dentally? A. That was the beginning of a decrease in our sales for this particular shirt.

Q. Actually so far as the Squires Shirt sale complained of in this suit is concerned, that occurred in 1947, did it not? A. This particular shirt, I believe it did.

Q. And this suit is predicated upon a sale made by Squires, in 1947 isn't that true? A. I understand that is true, yes.

Q. And when you say that appearance of infringing or similar garments is coincidental to the decline are you referring to the appearance of shirts made or sold by some other people than the defendant in this suit? A. I am referring in the first instance to the appearance on the market of shirts made by Spectator, which is the Corsair shirt about which I was asked.

Q. And that was in 1947? A. If you recall my statement of figures the decline of sales on our Flightmaster shirts did not take place until 1948.

Q. That's what I thought and actually you stated that you saw the Spectator Shirt in Chicago in 1947, isn't that true? A. Yes sir.

Q. And that was at the time of rising sales on your part was it not? A. Yes sir.

Q. Now you spoke about the conventional sport shirt sales did not decrease but they did not increase, in 1946, I believe, is that correct. That's when you were referring to? A. I was referring, if I understand your question, I was referring to 1946.

Q. Now when you brought out this shirt under license from Cavu you pushed the shirt did you not? A. I would say as a matter of fact we didn't push the shirt, we were very skeptical about it, we manufactured as many of the conventional sports shirts during that period as we

were able to sell. We actually didn't manufacture this shirt during that period but it was made for us, and we did not push the sale of the shirt because of the factor of production. We were producing our own Shapely sports shirts, and if anything were were restrained in selling the Flightmaster shirt, rather than the opposite.

Q. When did you start manufacturing the Flightmaster shirt yourself? A. In 1948.

Q. In what part of 1948? A. I'd have to consult production records. Actually we may have started in the late fall of '47. We usually manufacture ahead of the period for which you are selling and shipping.

Judge Marx: I understood him to say he had some manufactured by Cavu Clothes first.

Q. In the first quarter of 1947, your company sold or shipped 1046 dozen Flightmaster, is that right? A. Yes sir.

Q. Now in the first quarter of 1948, you shipped 3,058 did you not? A. Yes sir.

Q. In the fourth quarter of 1947 you shipped 1574 dozen didn't you? A. Yes.

Q. And in the fourth quarter of 1948 you shipped 2681 dozen, didn't you? A. That's right.

Q. You spoke about the number of conventional sports shirts that were made in the last half of 1946, as being 10,300 dozen is that true? A. Yes.

Q. How many of those were made in the fourth quarter? Or shipped? A. I don't have that right now but I could obtain it, the breakdown.

Q. You don't have that? Now that next figure you gave was the second half of 1948, and you stated there was 4,083 dozen conventional sport shirts. A. Second half of '47.

Q. Yes, second half of '47, 4,083 now do you have the first half of that year? A. Yes.

Q. What was that figure? A. 3,438 dozen.

Q. Now in 1948, what was the figure in the first half for conventional sport shirts? A. 6,164 dozen.

Q. And how about the second half of 1948? A. 5676 dozen.

Q. Now do you make any sport shirt other than the Flightmaster and the ones which you have listed as conventional sports shirts? A. Yes sir, we make a line of short sleeved sports shirts, which are seasonal and I would say geographical in distribution; certain territories don't buy any of that type shirt.

Q. Well do you make any other sport shirt of the long-sleeved type such as we are talking about in this particular case. A. The figures which I read you were the figures of our long sleeved sport shirt line, excluding as I said half sleeves or short sleeves.

Q. You mean there is no distinction between them being conventional and perhaps some style of your own? A. I haven't omitted any comparable long sleeved sport shirts.

Q. Your company is paying the expense of this lawsuit is it not, for the plaintiff? A. Well sir our company has retained our general counsel who has been attorneys for our company for many years to protect our interests in this litigation. Does that answer your question?

Q. Maybe not fully but I show you a photostatic copy of a two-page document bearing date May 5, 1948, and on the second page purports to bear your signature. I ask you if that is a modification of the agreement between you and Cavu, with respect to the patents in suit? A. This is my signature, yes sir.

Q. And is that a copy of a document entered into between you and the plaintiff, your Company?

Judge Marx: Well we furnished that to you——

A. Well without reading it over it appears to be the modification of the agreement, yes sir.

Mr. Horton: I'll ask to have that marked for identification as Defendant's Exhibit D.

(Defendant's Exhibit D., was marked for identification.)

By Mr. Horton:

Q. Now that agreement, just speaking generally and not tying down to the words is the agreement relative to handling the expenses of this patent litigation and the division of recoveries, if any, isn't it? A. I'd have to look at it. It was the agreement at that time if it had my signature on it.

Judge Druffel: Well it will be agreed that that's the fact.

Judge Marx: We furnished it though.

* * * * * *

Mr. Horton: If Your Honor please, the Lazy-Eight shirt which we were talking about yesterday and which was identified as Defendant's Exhibit C, for identification, is a personal garment of Mr. Brohard's. He has brought in another one which is apparently identical in construction with it and we are making substitution of the one he brought in for his personal garment, and marking that C.

Judge Druffel: Has the Plaintiff finished his case?

Mr. Horton: Mr. Mack was on the stand, Your Honor.

Judge Marx: Were you through with him?

Mr. Horton: No I was not.

Richard J. Mack

resumed the stand and having been previously sworn, testified further as follows:

FURTHER CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Mack, during this period of 1947 and '48 to which you testified relative to sport shirt sales, your company was also making so-called dress shirts at that time was it not? A. Yes sir.

Q. And by dress shirts I mean either white shirts or colored shirts that are worn for ordinary business wear, is that what you mean by that? A. Yes sir.

Q. Now did the sales of that type of shirt increase any during that period? A. During what period?

Q. Well you spoke of the years 1947 and 1948. Do you have a summary of sales of dress shirts during that period? A. Not on dress shirts, no sir, I don't have it with me.

Q. Well can you state from your knowledge how the sales of dress shirts were during the period 1947 and 1948, did they increase during that period or decrease? A. The sales in dozens were maintained during that period, I would say there was no appreciable changes either way; the sales in dollar value increased, which was through the pricing increase. The sales in units to my recollection were reasonably close during that period.

Q. Fairly uniform during the quarters of both '47 and '48. A. Yes sir. That was of course a factor according to our production as well as anything else in the regular line.

Q. Can you state whether there has been any general business decline in clothing furnishings, during the last several months. A. Yes sir there has been in just the, oh, the last two or three months.

Q. And that has been general throughout the business? A. General throughout the industry, yes sir.

Mr. Horton: I ask to have marked for identification as Defendant's Exhibit E, the photostatic copy of a supplementary agreement between Mack Shirt Corporation and Cavu Clothes, dated as of July 1, 1947.

(Defendant's Exhibit E, was marked for identification.)

By Mr. Horton:

Q. I show you this document, photostatic copy of document marked Defendant's Exhibit E, for identification and which purportedly bears your signature. Is that the modification which was entered into between your company and Cavu relative to the license arrangements, as of the date it bears. A. It was.

Q. Now on that there are certain matters blocked out, now in paragraph two there was a matter blocked out and isn't it true that in that particular place on the original of that document the amount inserted there was 2 per cent? A. I'd have to compare this with the original document.

Judge Druffel: Well don't you know if they do we can save time.

Q. Well what is the royalty? A. The royalty is 2 per cent now.

Q. And isn't that the amount that was put in that. A. I believe it is, there were several modifications. I believe that this is the one upon which we were agreed to a 2 per cent of the wholesale list price as a royalty.

Q. Then in the next paragraph three, there is a portion there, there are two portions blocked out, Mack, it is agreed Mack is authorized to manufacture and sell men and boys' shirts under this license in any fabric up to March 31, blank. What year was that? A. I believe it was the following year, the year following this agreement.

Q. 1948? A. Yes sir.

Q. And that same paragraph goes on and thereafter to use any fabrics containing not over blank per cent of wool, or other animal matter. What was that per cent? A. 60 per cent. Which is trade designation of a wool fabric.

Q. Now on page two there was a portion blocked out as to—it says that after deducting expenses of litigation from recoveries, the parties will thereafter divide evenly any excess between Mack and Cavu until Cavu's share equals blank of the wholesale list price. What was that percentage? A. I don't rememebr.

Q. Could we, could you give me that figure?

Judge Marx: Certainly we could if it's relevant. I can't conceive any basis of its relevancy, here.

Mr. Horton: It is relevant because it goes directly of course to the participation of Mack in this case, and its interest.

Judge Marx: Well I've already stated we were satisfied and willing to make Mack a party to this case, either as plaintiff or defendant, I don't think they are a necessary party, but they are a proper party and we don't have any objection to them being made a party.

Mr. Horton: Well if they are made a party plaintiff that would satisfy me. Your offer yesterday was to make them a party defendant.

Judge Marx: Either.

Mr. Horton: Maybe I misunderstood you.

Q. Do you know what that percentage is? A. I don't recall, I don't remember the circumstances.

Q. Do you have the original of that document here in court? A. I have it in my possession, I don't know whether it's in court or not.

Judge Marx: Well I don't see that there's any question about what is the percentage of it.

A. I just don't recall what the arrangement was in reaching an agreement.

Judge Marx: Well we can find it and if it's relevant why we will advise Your Honor and counsel——

Judge Druffel: Well do you want to go ahead with your examination?

Mr. Horton: Yes I'll, if we'll get that later I am through with the examination of this witness.

Judge Druffel: You say you've finished?

Mr. Horton: That's all I have for this witness. If I can get that information later.

Judge Druffel: All right. Is that the Plaintiff's case?

Judge Marx: Well I understand it's on that point, that agreement that he's talking about now is superceded——

Judge Druffel: Well of course as I say I don't know, I still don't know, the defense haven't disclosed just why they want it.

Judge Marx: Well I have no idea in the world where it is relevant.

Mr. Horton: Well the reason why that agreement is pertinent and the figures are pertinent are because it shows the interest of the Mack Shirt Company in this lawsuit, as it claims, and it shows their participation in any possible recoveries as well as their participation in the decision to file suit and the expense of carrying forth suit, and that coupled with the fact that they have an exclusive license makes them a necessary party and shows the interests and bias of the witnesses of the Mack Shirt Corporation who may have testified in this case.

Judge Druffel: Now do you want to make them a party plaintiff?

Mr. Horton: I don't want to make them, I don't care about making them party plaintiff, he offered to and I said that I'd be glad that, if they were.

Judge Marx: I move that they be made a party plaintiff, not on the ground that they are a necessary party, because in our humble opinion they are not a necessary party, otherwise they would have been made originally as such, but because it's apparent that they would be a proper party, there appears to be no objection on anybody's part to making them.

Judge Druffel: Well then you're making them party plaintiff, and there's no objection on the part of the defendant?

Judge Marx: Yes.

Judge Druffel: All right you prepare an entry then.

Judge Marx: They will simply join in the declaration.

Judge Druffel: Well that's all right. Now is that the plaintiff's case?

Judge Marx: No, we have a deposition, if Your Honor please. . . .

* * * * * *

Judge Marx: Do you want to mark this—Well I imagine it's filed with the clerk but in any event we are offering it and you'd better mark it as an exhibit, and then there won't be any question about it.

(Plaintiff's Exhibit No. 14, was marked for identification and received in evidence.)

Mr. Horton: And we would of course like to offer the Cross examination. . . .

* * * * * *

Judge Marx: This, if Your Honor please, is the exhibit that was attached to her deposition, and we'd like to offer this exhibit as a part of the deposition. I gave the reporter our copy to mark and I would like to substitute the original which the Clerk is now offering.

Judge Druffel: All right.

(Plaintiff's Exhibit No. 15, was marked for identification and received in evidence.)

Judge Druffel: That's the plaintiff's case, then?

Judge Marx: Yes sir.

Judge Druffel: All right, Defendants may proceed.

Mr. Horton: If Your Honor please I'd like to call to the Court's attention and file the stipulation between the parties stipulating as to the incorporation of the plaintiff corporation and the defendant corporation as alleged, and that at the trial of this cause uncertified copies of letters patent and photostatic copies of foreign letters patent and uncertified copies of printed publications may be used with the same force and effect as duly certified copies thereof, subject to correction if error appear. I should like to file that deposition.

Judge Druffel: Stipulation.

Mr. Horton: Stipulation.

Now I handed to Your Honor a couple days ago, two folders that I would like to have marked. I should like to have marked Defendant's Exhibit F, and I will offer in evidence in this instance a folder containing the Patents and References considered by the Patent Office in examining the application for the Brohard design patent 146985, that included the Aaronson Patent, the Coleman Patent and the page from 1940 Catalog of Sears Roebuck & Company.

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(Defendant's Exhibit F was marked for identification and received in evidence.)

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And after that what did you do?

Mr. Horton: I offer as Exhibit G, the file wrapper and contents of the design patent in suit.

(Defendant's Exhibit G, was marked for identification and received in evidence.

• • • • • • •

I should like to have marked and I will offer in evidence as Defendant's exhibit H, a set of the Patent References considered by the Patent Office in examining the application for the Brohard patent No. 2428198.

(Defendant's Exhibit H, was marked for identification and received in evidence.)

* * * * * *

Now I will offer in evidence as Defendant's Exhibit I, file wrapper and contents of Brohard Patent No. 2428198.

(Defendant's Exhibit I, was marked for identification and received in evidence.)

* * * * * *

Mr. Horton: I shall offer in evidence as Defendant's Exhibit J, the Beach Patent No. 570081. That is included in the new amendment.

(Defendant's Exhibit J, was marked for identification and received in evidence.)

* * * * * *

Now I offer in evidence as Defendant's Exhibit K, the Swan patent, Number 2150096.

(Defendant's Exhibit K, was marked for identification and received in evidence.)

* * * * * *

Now I offer in evidence as Defendant's Exhibit L, The Turcotte Design patent No. 129909.

(Defendant's Exhibit L, was marked for identification and received in evidence.)

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Mr. Horton: Now I offer as Defendant's Exhibit M the Lardner design patent No. 130692.

(Defendant's Exhibit M. was marked for identification and received in evidence.)

* * * * * *

Mr. Horton: Now I offer as Defendant's exhibit N. the Karplus patent Design 114021.

(Defendant's Exhibit N. was marked for identification and received in evidence.)

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I offer as Defendant's Exhibit O, the Underdown patent No. 167139.

(Defendant's Exhibit O, was marked for identification and received in evidence.)

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Now I offer in evidence as Defendant's Exhibit P the Baldwin patent No. 1112248.

(Defendant's Exhibit P, was marked for identification and was received in evidence.)

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Now this next patent, if Your Honor please, I did not have in the group which I handed to you and is not one which I mentioned before, it is one which is listed. This is the Cooper patent 2010349.

(Defendant's Exhibit Q, was marked for identification and received in evidence.)

• • • • • • •

Mr. Horton: I offer the Cooper patent No. 2010349 in evidence as Defendant's Exhibit Q.

• • • • • • •

I offer in evidence as Defendant's Exhibit R, the Wallace patent No. 1973421.

(Defendant's Exhibit R, was marked for identification and received in evidence.)

• • • • • • •

. . . I'll offer the depositions taken at the Fox-Knapp Manufacturing Company, as Defendant's Exhibit "S" . . .

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(Defendant's Exhibit S was marked for identification and received in evidence.

The jacket I would like to offer in evidence—I suggest that I mark this Defendant's Exhibit S-1.

(Defendant's Exhibit S-1 was marked for identification and received in evidence.)

To authenticate the manufacture and sale of that garment, the witnesses from the Fox Knapp Company, identified a number of folders and papers which do establish its date, and I offer in evidence as Defendant's Exhibit S-2, the folder illustrating the Burger Ruüd jacket, and the line of equipment put out by that company. That folder was stated by the witnesses to have been produced and published in 1938 and '39.

(Defendant's Exhibit S-2 was marked for identification and received in evidence.)

I offer as Defendant's Exhibit S-3, a group of five sheets which the witness at Fox Knapp testified were the price sheets for the Burger Ruüd jackets which he had had in his possession from 1938 to the date of the deposition, and which identify the garment by a style number and gave its prices, and which he said he had sold at those prices.

(Defendant's Exhibit S-3 was marked for identification and received in evidence.

I offer as Defendant's Exhibit S-4, a folder which the witness testified had been in his possession since the, 1938 and which illustrated the types of material from which the garments were made, identifying them with the article by style number.

(Defendant's Exhibit S-4, was marked for identification and received in evidence.)

I offer in evidence as Defendant's Exhibit S-5, a page from the Daily News Record of Monday, June 13, 1938

which the witness testified appeared in the newspaper of that date, referring to the article.

(Defendant's Exhibit S-5, was marked for identification and received in evidence.)

I offer in evidence as Defendant's Exhibit S-6, a folder which the witness produced showing illustration of the article in a magazine "The Boys' Outfitter" for July 1938, which he stated was published in that month.

(Defendant's Exhibit S-6, was marked for identification and received in evidence.)

* * * * * * *

Included in this same folder but starting at page 24, are depositions taken at the office of the Shirtcraft Company, Inc., and I offer those depositions at the Shirtcraft Company in New York as Defendant's Exhibit T.

(Defendant's Exhibit T was marked for identification and received in evidence.)

* * * * * * *

Mr. Eyerly testified that he had prepared a folder which was there marked for identification and which I will offer here as Defendant's Exhibit T-1.

(Defendant's Exhibit T-1, was marked for identification and received in evidence.)

And which illustrates the so-called Airman's Stratomaster jacket. He also stated that he had printed at that same time a folder of which I will offer only page 2 as Defendant's Exhibit T-2.

(Defendant's Exhibit T-2, was marked for identification and received in evidence.)

* * * * * * *

Mr. Horton: And four of them I offer jointly as Defendant's—perhaps I should offer first of all the depositions here in Baltimore as Defendant's Exhibit U.

Judge Druffel: All right.

(Defendant's Exhibit U was marked for identification and received in evidence.

Judge Druffel: Now there's one jacket that hasn't been offered there.

Mr. Horton: Yes sir. I don't think this man identified it.

(Defendant's Exhibit U-1, Deposition Ex. 10, was marked for identification and received in evidence.)

Yet, he stated these patterns were made in the beginning of May, 1941, and fixed the time by the fact that the company moved to a building on Second Street to McKinley Street in September, 1941, and the patterns were made prior to moving to that office. The patterns were in the cutting department under his supervision at the time they were made, and that Notation 61 and 82 on the patterns refer to the particular model shirts. He said that the first cuttings for the sizes were made in August 1, 1941, under cut numbers 5501, 5502, 5503, 5504 and 5505. He then referred to a book, which he stated was the record of all of the cuttings for the year 1942 and 1943, or 1941 and 1942, and stated that the entries pertaining to the cuttings had been made in the regular course of business, and that the book had been in his possession at all times since its preparation. I'll offer that as Defendant's Exhibit U-2.

(Defendant's Exhibit U-2 was marked for identification and received in evidence.)

* * * * * *

. . . I offer the invoices in evidence as Defendant Exhibits U-3 and U-4.

Judge Druffel: Just mark them as one, they are all tied together, aren't they?

Mr. Horton: All right sir, that's quite satisfactory, there are, the U-3, and there are six invoices.

(Defendant's Exhibit U-3 was marked for identification and received in evidence.)

The witness then produced a summary of the sales records of the Model 61 Stratomaster and the Model 82 Skymaster cross zipper jackets and stated that they were a true summary of sales and shipments made from the records of the company and it was marked Exhibit 19 for identification and I offer that as Defendant's Exhibit U-4.

(Defendant's Exhibit U-4 was marked for identification and received in evidence.)

Defendant's Exhibit U-4 comprised three pages.

He also identified an additional group of invoices listing them by invoice number and by the names of customer, and that was marked for identification Exhibit 20, and he stated that that was a true summary and I offer that in evidence as Defendant's Exhibit U-5.

(Defendant's Exhibit U-6 was marked for identification and received in evidence.)

Consisting of six pages. There was then identified a price list of the Shirtcraft Company men's shirts for Fall, 1941, including within the price list the two shirts marked for identification and I offer that in evidence as Defendant's Exhibit U-6.

(Defendant's Exhibit U-6 was marked for identification and received in evidence.)

* * * * * *

. . . I offer in evidence as Defendant's Exhibit U-7, the Airman Stratomaster Jacket identified in the deposition as Defendant's Exhibit 9.

(Defendant's Exhibit U-7 was marked for identification and received in evidence.)

I offer in evidence as Defendant's Exhibit U-8, the jacket identified in the deposition as Defendant's Exhibit 11.

(Defendant's Exhibit U-8, was marked for identification and received in evidence.)

* * * * * *

Mr. Horton: Then we took the depositions of three witnesses in Chicago of the Angelica Jacket Company, and I offer those depositions as Defendant's Exhibits V.

(Defendant's Exhibit V was marked for identification and received in evidence.)

In those depositions the first witness called was Mr. Louis Karger. He stated that he was the manager of the Chicago branch, that the business of the company was manufacturing and selling washable service garments and uniforms for hotels, hospitals, barbers, doctors, dentists and the like and that catalogs were regularly kept in the company's office in Chicago as well as in its St. Louis office and elsewhere and that one of the catalogs which was regularly kept in the file was a catalog of 1941, identified as the professional catalog, and he produced the catalog from the file and stated that it had been in his files at least prior to March 10, 1942, which was the date of an amended price list stapled to the inside of the cover. The catalog was, the particular portions of the catalog which were pertinent were, besides the cover page and date, pages 4 and 5, which showed two zippered jackets, and I offer those portions of the Angelica catalog of 1941 as Defendant's Exhibit V-1.

(Defendant's Exhibit V-1, was marked for identification and received in evidence.)

In addition he stated that the Chicago Office kept copies of invoices of shipments made out of the Chicago Office and of orders made, requisitions made upon the Home Office factory in St. Louis, and he stated that, he produced a number of such invoices which were serially marked and stated that they were from the records of the office regu-

larly kept and that the two garments shown in the catalog were listed in these invoices and showed the name of the purchaser and the date of shipment, and, he produced nine of these and I'll offer the nine in evidence as Defendant's Exhibit V-2.

(Defendant's Exhibit V-2 was marked for identification and received in evidence.)

He also produced and identified copies of their requisitions of which two were offered in evidence and which I now offer in evidence as Defendant's Exhibit V-3.

(Defendant's Exhibit V-3 were marked for identification and received in evidence.)

The witness then identified as Defendant's Exhibit 11, one of the jackets made by the Angelica Jacket Company and having the covered diagonal closure as shown on page 5 of the Professional Catalog. I offer that in evidence as Defendant's Exhibit V-4.

(Defendant's Exhibit V-4 was marked for identification and received in evidence.)

* * * * * *

He then identified the other zippered garment shown in the catalog as a product of the Angelica Jacket Company and that was identified as Defendant's Exhibit 11, and that I offer in evidence as Defendant's Exhibit V-5.

(Defendant's Exhibit V-5 was marked for identification and received in evidence.)

* * * * * *

I offer as Defendant's Exhibit W, a certified copy of the particular pages of the Angelica catalog from the copyright office, showing that it was deposited in the U. S. Copyright Office, on February 26, 1941.

(Defendant's Exhibit W, was marked for identification and received in evidence.)

Now I'll call Mr. Fenton.

Elmer Fenton

was called as a witness and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horton:

Q. What is your full name? A. Elmer Fenton.

Q. And what is your age? A. I am 42.

Q. Where do you reside? A. My residence is at 246 Calhoun Street, Cincinnati.

Q. What is your occupation? A. I am a buyer of men's furnishings at Squires, Inc.

Q. How long have you been employed by that company? A. I have been there since October of 1947.

Q. How long have you been employed in the men's furnishing business? A. 21 years.

Q. Do you know when the Defendant, Squires, Inc., first bought, sold Corsair Sport Shirts? A. That was in November of 1947.

Q. Does it have any in stock at the present time? A. We have some, yes.

Q. Had Squires, Inc., continuously carried the Corsair shirts in stock from the time of its first purchase? A. From that time, yes, we have carried them in stock.

Q. Can you state what have been the total purchases of Corsair sport shirts by Squires, Inc.? A. We have used 48 dozen.

Q. During this same period has Squires carried other makes of sports shirts? A. Oh yes.

Q. Has it carried the kind of sport shirts which button down the front? A. Yes we carry the button shirt.

Q. And other styles of sports shirts? A. Oh yes.

Q. And when I speak of sport shirts I mean, I am talking particularly now of the long sleeve type, is that what you have in mind? A. That's right.

Q. Can you state what the percentage has been of total sport shirt sales by Squires, in the year 1948, as represented by Corsair shirts? A. The Corsair shirt represented about 7-6/10ths percent of our business.

Q. Have you maintained, that is 7-6/10ths per cent of your—— A. Our sport shirt business.

Q. That is sport shirt business. You also sell dress shirts do you not? A. Yes sir, dress shirts.

Q. Have you maintained the same price for Corsair shirts at all times that you've handled them? A. Well the Corsair shirt is fair-traded at $10.00 and we maintained that price.

Q. Is that still maintained at $10.00? A. $10.00 yes.

Q. Now are the other types of sports shirts to which you referred of a comparable price? A. They are $10.00 yes.

Q. Can you state from your experience what is the common practice as to the wearing of neckties with sport shirts of all kinds.

Judge Marx: Well I don't think he is qualified.

Judge Druffel: He says he's been in the business for 21 years.

Judge Marx: The question covers a much broader field than that. If it was his personal observation.

Mr. Horton: I limited it to his experience.

Judge Marx: Limit it to his personal observation.

Judge Druffel: Do you have any experience in that regard?

The Witness: I am the buyer of the furnishing goods department. I have sold a lot of sports shirts, I have seen

them sold by the men that are under my jurisdiction. I pick out the merchandise for the windows, and in most cases it is displayed the way I suggest it be displayed.

Judge Druffel: All right.

By Mr. Horton:

Q. Now what is the practice so far as your experience is concerned as to the wearing of ties with sports shirts generally? A. We do not suggest ties with them, with a sport shirt, and most of our customers do not wear ties with them; if they use them with sport clothing.

Q. Now is that true of the button down type and other types of sports shirts as well as the Corsair? A. Yes sir.

Q. From your experience will you state what if any trend you have observed in the sport shirt business generally starting with a period well just before the war? A. Well just what do you mean by that?

Q. Well, is the sport shirt business something of rather recent—— A. Yes, during the war of course the sport shirt became very popular when you couldn't get other shirts and we sold any kind of a shirt, as long as it had a collar and sleeves in it, we sold the shirt, we couldn't get white shirts, fancy shirts, enough to take care of our needs.

Q. And what of the present time, is it a substantial portion of your business? A. In 1948 it was 42 per cent of our shirt business, that's sports shirts and dress shirts.

Mr. Horton: That's all. Cross examination.

CROSS EXAMINATION

By Judge Marx:

Q. Well I don't think there's very much to ask you except one thing I'm sure you didn't intend to say, you didn't intend to say that all your sport shirts sold at $10.00. A. I said that we have sport shirts of that type which are at $10.00.

Q. Yes, you have sport shirts in what price ranges? A. We have sport shirts that would range in price from $5.00 to $27.50. But the biggest portion of our price range is in $10.00, that is our popular price range.

Q. Do you have any sport shirts cheaper than $5.00? A. At the present time, no. With the summer season there will be lightweight things under that price range.

Q. What price range? A. $3.95.

Q. You mean to say that you've never seen a man wear a sport shirt of the Corsair type with a tie? A. Yes I have seen it.

Judge Marx: That's all.

Judge Druffel: All right.

Mr. Horton: No further questions. The defense rests, Your Honor.

Judge Druffel: How many witnesses do you have in rebuttal?

Judge Marx: I only have one or two. We'll call Mr. Fenton as a witness.

Judge Druffel: Is this for further cross examination or rebuttal?

Judge Marx: It's immaterial to me, I just want him to identify a ad.

By Judge Marx:

Q. I show you Plaintiff's exhibit 14 and ask you if you saw that advertisement published by Spectator Sportwear Co., Inc. A. Yes. Yes I have.

Judge Marx: Well I'll offer this advertisement in evidence.

Judge Druffel: Well what does it purpose to be?

Judge Marx: I want to put the other in before I forget it.

Mr. Horton: I object to it as immaterial although I don't see its materiality now. It's not in principal anything that has connection with the defendant in this case.

Judge Marx: Now you've changed exhibit 14 to exhibit 16, and exhibit 16 then is the advertisement which the witness just identified as having been published by Spectator Sportswear Company, Inc?

(Plaintiff's Exhibit No. 16, was marked for identification and received in evidence.)

Q. Now I'll show you exhibit 17 for identification and ask you if that's an advertisement which Squires published of the Corsair shirt. A. Yes sir.

Q. I'll show you the cut, in Exhibit 16 of the Corsair shirt and ask you if the cut which was used by you is the same cut that appears in the Spectator Sportswear Company ad. A. I wouldn't know that, that's our advertising man's——

Q. Well look at it and compare it. A. I couldn't be sure, I don't know that much about cuts.

Judge Druffel: Let me see it. Well I'd say they're the same.

Judge Marx: They're the same the way Your Honor's looking at them. I want to call your Honor's attention to the fact that they advertise that they've applied for a patent on the Corsair shirt, indicating that they consider there's novelty in the idea and have applied for a patent.

Mr. Horton: That of course isn't so at all. That is what the patent is on and what they are claiming.

By Judge Marx:

Q. I'll ask you whether the mat for the cut part of it was not supplied by Spectator Sportswear Company, Inc., to you? A. I wouldn't know that, that would go to our advertising manager, I wouldn't see it.

Judge Druffel: Well it's a fair assumption at any rate.

The Witness: I don't know. It would be in his hands, I don't know.

Q. In any event wouldn't you say that the shirt advertised by you and the shirt advertised by Spectator Sportswear Co., Inc., under the title Corsair is the same shirt?

A. That I would say, yes sir.

Judge Marx: That's all.

Judge Druffel: All right, you're excused.

(Witness excused.)

Judge Marx: We'll offer these two exhibits in evidence.

Mr. Horton: Well I object to them, I suppose the ad put out by Squires is certainly admissible as they are a defendant in this case. Now although it has not been identified in any way to date I guess this does bear a date,——

Judge Marx: What is the date?

Mr. Horton: Well this paper which looks authentic says March 18, 1948. I trust that it was published on that date. As to plaintiff's exhibit 16, there has been no testimony as to when it was published or where it was published and it was put out by, bears the name Spectator Sportswear Co., Inc., who is not a defendant in this case, and I object to its receipt in evidence.

Judge Marx: Well as attorney for Spectator Sportswear, Inc., don't you admit that was published by Spectator Sportswear Co., Inc.?

Judge Druffel: Well it will be received for what it's worth. All right, next witness.

(Plaintiff's exhibits No. 17 was marked for identification and received in evidence.)

Judge Marx: I'll go ahead with this witness and in the meanwhile I wish you'd ask your associate to produce the application for patent that was applied for by Spectator Sportwear Co. Inc.

Mr. Horton: Well I do not have it and I wouldn't produce it—I haven't got it, and furthermore it wouldn't be admissible in this case.

Judge Marx: Well we think it is admissible in showing what they claim was novelty of the invention. And we demand that it be produced, that counsel here has admitted that he is counsel for Spectator Sportswear Co. Inc., and is being paid by them.

Mr. Horton: To defend Squires, Inc., in this case.

Judge Marx: Well that's a matter of argument, I don't want to take the time to go into, we are simply making now the formal demand that it be produced here.

Mr. Horton: Well I do not have it and can't produce it.

Judge Marx: Well counsel can obtain it, he's their attorney.

Mr. Horton: I am the attorney to defend Squires, Inc., in this case, and I'm being paid by Spectator for that purpose.

Judge Marx: Well Spectator Sportswear Co. Inc., is in control of this litigation as the witness testified on the stand and that testimony, we have that testimony written up, and we are requesting Your Honor to require them to produce this application, Your Honor can then read it and rule on its relevancy.

Judge Druffel: Well I don't see that I have any power to compel them to produce it. They are out of the jurisdiction of this court and counsel said that he doesn't have it and couldn't produce it.

Judge Marx: Well Mr. Freeman for Spectator Sportswear Co. Inc., also, Mr. Freeman here I am advised is attorney for Spectator Sportswear Co. Inc., also.

Judge Druffel: Well do either of you have any knowledge of any application for a patent?

Mr. Horton: I don't know what knowledge, I certainly don't have any copy of the application, I don't know what the application is or knowledge, I certainly don't have any copy of it, I don't know, Spectator is not a party to this, what has progressed or what's happened to it I don't know, it's not here I don't have any right, Patent applications are secret and kept secret in the Patent Office, I don't think I would have a right to give up that secrecy if I did have it, but I say to Your Honor honestly that I do not.

Judge Marx: Well Mr. Freeman is here let him speak for himself.

Mr. Freeman: Well I don't think, I object, and insist upon the fact that whatever patent application Spectator has are not pertinent to this lawsuit and they are not parties and they ought not to be compelled to produce them.

Judge Druffel: The objection will be overruled in view of the statement they haven't the application. I mean the objection will be sustained. All right.

Montie M. Brohard, Jr.,

was recalled as a witness for rebuttal testimony and was examined and testified further as follows:

DIRECT REBUTTAL

By Judge Marx:

Q. Mr. Brohard have you read the various references that counsel introduced here in evidence as part of his case this morning? A. I scanned the drawings, I haven't read all the references, verbatim.

Q. You have examined all the drawings? A. Yes sir.

Q. Have you prepared in connection with the examination of those drawings a transparent template containing your patented shirt as exhibited by the drawing in your patent? A. I did.

Q. And have you had enlarged the drawings contained in the references made here in a large number of the cases so that template or transparency can be placed on those drawings to show similarity or dissimilarity?

Mr. Horton: If Your Honor please I object to that, to this whole examination of prior art reference, or fact by comparing identical lines for transparency is not a test either of infringement or validity, as of course is well known. Of course the question here is whether the elements of novelty claimed for the patents in suit are novel and amount to invention and it makes no difference whatsoever whether this transparent template would fit any of the references or fit none of them.

Judge Marx: It's not a fitting I merely asked him whether in order to illustrate graphically he had enlarged the drawings contained in the references to the same scale as the template.

Judge Druffel: Well that would be a very novel test and I don't think it would be controlling at all.

Judge Marx: I didn't say it was controlling, I am merely now asking him whether or not——

Judge Druffel: He's going to answer yes.

Judge Marx: Whether he's enlarged these drawings because we're going to introduce the enlargements for purposes of easy comparison in this court or in any other court to which it may be directed.

Judge Druffel: All right the answer is yes.

The Witness: Yes sir.

Judge Marx: Now we'll introduce in evidence as an exhibit this Template which will be part of the record.

Mr. Horton: Well I object to it on that ground that it cannot be used for that purpose properly in a patent suit.

Judge Druffel: Well as I see the only value it has is for argumentative purposes, now if you want to introduce it purely for that——

Judge Marx: I understand you can produce drawings or diagrams or anything else——

Judge Druffel: That's right but the point is that these original patents in copy they speak for themselves, and if he wants to be examined as to any similarity or dissimilarity he can point out any question like that, but I mean the measurement of putting his transparent drawing over the others and then comparing it that way I don't think that that—you can use it for purposes of argument——

Judge Marx: Well that's what we want to do is use it for illustration.

Judge Druffel: All right.

(Plaintiff's Exhibit No. 18, was marked for identification and received in evidence.)

Judge Druffel: Well I tell you we'll make progress if you'll clear those exhibits off and let the witness go around and use that pleading box then.

Now may I suggest something here that perhaps may shorten it. The, if you remember the counsel that introduced these prior art patents just touched on certain outlines. It will be unnecessary to describe the whole thing.

Judge Marx: Yes, Your Honor, I am going to try to shorten it as much as I can with safety to our case. While they are trying to find the identical copy that we handed the Court, I'll show you the reference to 2143931 and ask you if that's an enlargement of the drawing you made in that case?

(Plaintiff's Exhibit 18A, Witness Brohard was marked for identification and received in evidence.)

The Witness: Yes sir.

Q. Now you take the original and hand it to the Court and I'll exhibit to the court the template of your pattern.

Mr. Horton: If Your Honor please, now this testimony about transparency and these enlargements is wholly immaterial, and irrelevant upon this question, and it is certainly an unfair test of any differences, now if it is going to be used for a demonstration and argument certainly counsel can do that if he wants to but I don't think that the witness here—should testify as to this matter at all.

Judge Marx: The witness is not using it.

Mr. Horton: Well perhaps I'm out of order. You started talking about transparency as an argument.

By Judge Marx:

Q. Now will you take the drawing in Patent No. 2143931 and are you able to state whether there is any substantial difference between that design of Aaronson and the mechanical and design patent of yours? And if so what it is. A. There is a substantial difference between the drawing of this patent and my design patent from the standpoint that the slide fastener closure on this patent does not run off the garment in a downward and backward direction but it comes to the center of the garment and then cuts down; and if worn with a jacket the front of the garment would be impaired. On the mechanical patent, my mechanical patent, cannot be read against this drawing.

Q. Why not?

Judge Druffel: Well they are different claims, that's fair enough.

Mr. Horton: If Your Honor please I think that this, I don't want to interfere with the other side's case at all but these patents certainly speak for themselves, and it seems to me this whole matter of difference is a matter of argument which counsel can state just as well this witness.

Judge Marx: Well now that's expert testimony and we have a right to put in an expert who knows the patents and knows the designing and manufacture and explain wherein the differences exist.

Judge Druffel: Well this is all so queer, now so far as the Court's concerned the——

Judge Marx: Well I'm passing on to the next part——

Judge Druffel: Well go ahead, let's see what happens then.

(Plaintiff's Exhibit No. 18-B, witness Brohard, was marked for identification and received in evidence.)

By Judge Marx:

Q. Now I'll show you the reference to the Sears Catalog of 1940, No. 181 DG 407, and ask you to state in answer to the same question whether there are any substantial differences and what they are between that reference and your patents. A. Well there are substantial differences between my design patent and this garment in that the slide fasteners run at opposing angles, and the front of the shirt would be marred by the appearance of this slide fastener arrangement on the Mainliner named garment here. The zipper does not start underneath the collar point and does not have the same streamlined appearance as my patent. From the mechanical standpoint the claims on my patent will not read against the, this garment.

Q. Is exhibit 18-B an enlargement of the Sears reference? A. It is.

Q. I'll ask you the same question with reference to design patent No. 113201, known as the Coleman patent. A. There's no similarity at all in this design and mine. First of all there is no collar on this dress. The opening of the front is an angular opening although it cuts to one

side for a short distance and then makes a definite turn of about a 120 degree angle and goes straight south.

From a mechanical standpoint this won't read any way with my claims.

Q. Take the next one, I'll show you the first patent under Exhibit H numbers produced by the Defendant, which is the Gold garment, March 13, 1934, No. 1951240, and ask you the same question with reference to that. A. Wait just a minute we'd like to locate it.

Mr. Horton: The Gold patent was a patent office reference.

Q. Have you got the drawing? A. Yes.

Q. I'll ask you the same question with reference to that. A. From a design standpoint it's obvious that there is no relationship at all.

Q. Well state wherein there is a difference. A. There is a difference in this one between mine because the zipper comes straight down the front of the garment, the zipper is in the exact center of the garment, the upper terminus of the zipper does not come underneath either collar point, and when when worn with a coat this coat, garment, would have a split appearance, and would have seams and zipper showing, as well as stitching. The mechanical patent it is hard for me to conceive how anybody would relate my mechanical claims to this garment.

Q. I'll show you the next one in the same reference in the Patent Office file which is the Greenberg separable slide fastener, March 5, 1935, No. 1993297, and ask you the same question with reference to that. A. From a design standpoint this garment is in no way related to mine for the same reasons as the comments I made on the previous patent. This garment has a center opening, there is no detailed drawing of the upper terminus of this slide fas-

tener, but it is pretty obvious that it does not terminate underneath the collar point, and the appearance with a coat on would give you a split appearance. From a mechanical standpoint there is no possibility of making it read on my claims.

Q. I'll show you the next reference in the Patent Office file, which is the Lake overcoat or the lining. Dated June 26, 1928, No. 1675113, and ask you whether this enlarged sheet is an enlargement made from that drawing? A. It is.

Q. Will you give it a number please.

Judge Marx: We'll offer the enlargement as Exhibit 19.

(Plaintiff's Exhibit No. 19, was marked for identification and received in evidence.)

Q. Will you explain that exhibit? A. From a design standpoint there is no similarity between this garment and mine, inasmuch as it represents figuratively speaking, merely a double-breasted garment, with an extension to the upper lapel of the garment with a tricky side opening in the left side. From a mechanical standpoint it will not read on my claim.

Q. The next reference appears to be from the Deutsches Reich. It's stamped here in the Patent Office, August 11, 1938 and is Natent No. 502889, Clause 33, Group 7,—that's sufficient identification. A. Well obviously there's no similarity between this garment and mine, on a design patent. There is no collar whatsoever on the garment, it looks like a jerkin type of garment and is worn over a negligee shirt, for what purpose I have no idea. From a mechanical standpoint it's inconceivable that this garment would read upon my claims.

Q. Now I show you the British patent which is next in the same reference, which is apparently Patent Specifica-

tion No. 376657, an application dated January 13, 1932. And ask you the same question in reference to that garment. A. There is no resemblance whatsoever from a design standpoint.

Judge Druffel: Is this the Underhill that that you are reading from?

The Witness: Yes sir. Ethel Maud Underhill. From a design standpoint there is no resemblance because there is no laydown collar, the zipper is straight up and down and if worn with a coat the frontal appearance would be blemished. From a mechanical standpoint there is no laydown collar and the drawing as it appears here cannot be read into my claims.

Q. The next reference is the Glanfield reference No. 428-833, which I believe is a British patent, and I'll ask you whether the two sheets that I show you are an enlargement of the drawings contained in the patents before you? A. Figure 2 is enlarged and Figure 3 is enlarged.

Judge Marx: Will you give this a number?

I'll offer Exhibit 20, as an enlargement and ask you the same question with reference to the original patent before you, as I have with reference to previous patents.

(Plaintiff's Exhibit No. 20, was marked for identification and received in evidence.)

A. All right, I'm going to answer this one in separate parts, Your Honor. On Figure 1 you do not have an enlargement of but there is no comparison on Figure 1 from a design standpoint, or mechanical standpoint. For quite obvious reasons—do you want me to elucidate on them.

Q. Well I think the reasons are so obvious that any elucidation would be unnecessary. A. Figure 2 you do have an enlargment upon, and there is no resemblance

there from a design standpoint, mainly because the garment is of multi-parts in the front of irregular nature, the upper terminus of the zipper is not underneath a collar lapel, and the shape of the collar lapel even if we can visualize it turned down does not resemble the overall appearance of my design. Mechanically I don't see how it can read on the claims of my patent. Figure 3 is the, a design which more closely approximates my design I will admit than any other design that has been shown although it itself does not have the same overall appearance to me as a designer, nor I am sure to the man on the street as the patent that is in suit.

First of all the diagonal closure on this shirt is a button closure, secondly it goes to the center of the collar, third it does not have the open skirt at the bottom; fourth, the collar is in no way shaped like the collar on the Tailspin patent, it is an old-fashioned turned down knit collar, apparently from this drawing, or corduroy. From a mechanical standpoint it cannot possibly read in my opinion on the Tailspin patent.

Q. Can you say why not?

Judge Druffel: Well it's apparent here.

Q. Well take now the Beach Waterproof garment, which was Exhibit J, and is the first Exhibit independent of the Patent application references, the No. 570081, patented October 27, 1896, which I facetiously referred to as looking like a Russian cossack, or something like that. A. Referring to this whole page—do you have the pages of illustrations before you? Referring to this entire page of illustrations, this garment is no comparison from a design standpoint, because first of all the closure, whether it is straight or curved starts in the very center of the garment, which if you can visualize worn with a coat would give you a broken front appearance, and secondly, the line of the

closure is broken at an angle and goes almost directly to the armpit and then down. An entirely different conception of a style.

From a mechanical standpoint there is no way in which this patent can read upon mine, for approximately the same reasons as the other patent, in that it starts right at the center, comes down over the armhole. It does not have an upper terminus under either collar point and the collar itself is of an entirely different nature than the collar on my garment.

Q. I'll show you Exhibit K, No. 2160096, which is the Swan garment, dated May 30, 1939 and ask you the same question, with reference to that. A. From a design standpoint there is no similarity and this garment of mine. First of all it has a center opening created by a double-breasted effect, the opening does not terminate under either collar point, it is stopped short at approximately the right breast. From a mechanical standpoint it is a slip-over model in the first instance rather than a negligee model.

Q. What do you mean by slip-over? Put it on over your head? A. It means you can't get into it any other way except pulling it over your head, or coming up over your feet.

Judge Marx: Will you give this a number, Mr. Wisenall, is it 21?

The Reporter: Yes.

(Plaintiff's Exhibit No. 21 was marked for identification and received in evidence.)

Judge Marx: Now I'll offer exhibit No. 21, which is an enlargement of the next patent which is——

Mr. Horton: I suppose that my original objection goes along with the enlargements that I made that they were very argumentative.

Judge Marx: That's the Turcotte Sports Jacket, Design Patent No. 129909, October 7, 1941, and I ask you the same question.

A. Although the opposing attorney has objected to the transparency——

Q. Well don't talk about that. A. All right. The design patent in this case is obviously contrary to mine because the very line of the zipper is in contrast to the line of my zipper. The upper terminus is half-way between the side of the neck and the shoulder point, instead of being underneath either collar point. The entire contourance of the parts of this garment are completely dissimilar to the Tailspin style. From a mechanical standpoint——

Q. Before you leave that is the line of the zipper on that across the front of the garment? Instead of being—— A. It definitely crosses the garment and if worn with a coat would mar the appearance of the front from the standpoint that we think the front should appear.

From a mechanical standpoint the claims cannot possibly read on this, as against on my claims, on this patent.

Q. Now I'll show you the Lardner reading jacket, Design Patent No. 130692, December 9, 1941, and ask you the same question. A. In the first place the front of this garment cannot even be considered, and in the second place from the appearance if you want to look at the back of this garment, or put the garment on backwards, it is no comparison from a design standpoint because there is no collar, secondly there is a very large repulsive looking center button at the top of the garment, and it is not a zippered style garment although I understand it makes no difference. From a mechanical standpoint it has, it cannot read upon the mechanical claims; first of all there is no collar and the upper terminus of the closure therefore cannot terminate under a collar point.

Q. Is this what might be called a wrap-around garment? A. It appears to me to be that way. I assume that, this drawing underneath here looks as though it were the underpart, although the——

Q. What is meant, those are terms that have been used here before, what is meant by the term wrap-around? A. Wraparound is a garment having two fronts of equal size and shape so that when wrapped around the individual they will button at approximately the same place on each side of the person. It's a device frequently used in maternity garments.

Q. I'll show you next the Karplus jacket Design patent No. 114021, dated March 28, 1939 and I'll ask to have the enlargement of that marked as Exhibit 22.

(Plaintiff's Exhibit No. 22 was marked for identification and received in evidence.)

A. From a design standpoint there is no similarity between this one and mine, first of all the slide fastener runs at an opposing angle to the slide fastener on my garment; second this slide fastener is completely exposed from top to bottom, this slide fastener starts in this illustration at the upper left shoulder, and terminates at the bottom in the center of the garment. When worn with a coat a portion of this fastener could be seen at the parting of the lower part of the coat in a single breasted coat; from a mechanical standpoint this garment couldn't possibly read on my claim.

Q. I'll show you next the Underdown button overcoat patented August 24, 1875 No. 167139, that's a sort of picture of General Grant is wearing.

Mr. Horton: Wearing a diagonal coat.

A. From a design standpoint the effect that we have achieved in the Tailspin shirt is lost in this garment because

the front of the garment is blemished by the stitching and the seam work. Secondly there is no collar on the garment of the type we are using on ours; this is considered a stand up collar. From the mechanical standpoint it's inconceivable to me as to how it could read on our claims.

Q. Next I'll show you the W. C. Baldwin women's reversible and adjustable housedress, No. 112248, patented September 29, 1914, and ask you the same questions. A. From a design standpoint the opening in this garment is not a straight line, it is a line which runs vertically down the front of the garment and then cuts over either under or around the breast to the left side of the garment and it's difficult for me to see here,—well it's not fastened by slide fastener, it's merely a wrap-around garment. From a mechanical standpoint, it can't read on my claims.

Q. I show you the Cooper garment, No. 2010349, dated August 6, 1935, and ask you the same question. A. From a design standpoint there is no similarity with the one exception that this garment does have a zipper that terminates under the collar point, but it terminates in a relatively different place than the termination of my shirt in order to from an entirely different aspect. From a mechanical standpoint it will not read upon my claims, mainly because the closure is straight up and down which gives an entirely different effect, and has an entirely different mechanical effect as a completed garment.

Judge Druffel: Now as I understand you claim that the Wallace patent does read on the mechanical patent in suit?

Mr. Horton: Yes, Your Honor.

Judge Druffel: So you may give that a little more attention.

The Witness: All right sir, I shall.

Q. I'll show you the next Wallace garment which is now before you, dated September 11, 1934, No. 1973421 and ask

you if this Exhibit No. is the enlargment of the garment, on the Wallace patent. A. Right. Figure 1.

(Plaintiff's Exhibit No. 23, was marked for identification and received in evidence.)

Q. Now I'll ask you the same question relative to the garment. A. From a design standpoint there is no conceivable comparison, first of all because there are two zippers instead of one, there is the big pouch pocket in front of the garment, the zippers do not terminate at the upper end under either collar point.

Judge Druffel: Well the design in those you can skip.

The Witness: That's right. From a mechanical standpoint number 1, there are one, two, three, four parts to the front of this garment, as compared to two in my patent. Number 2, neither zipper terminates at the upper end under either collar point; number three, there are two flaps underneath the identical sides of this garment that are buttoned underneath the center flap which falls down when the two zippers are pulled down in this garment which is an entirely different construction from our garment.

Secondly, or the fourth point, mechanically there is no pouch on the front of my garment.

Q. How many zippers are there on the front of that garment? A. Well there are two, two zippers instead of one.

Q. And what is the seam down the front? A. That is because they have pieced the garment in order to save material.

Q. In the practical operation of cutting patterns and manufacturing garments is there any differences between that garment and yours?

Mr. Horton: I object to that, of course it is not only immaterial here, it is not in the patent in suit of course.

Judge Druffel: I think he's covered about everything on that.

Q. Next I'll show you the—I believe the next exhibit was S-1, which I've asked my colleague Mr. Slutz to wear, taking that exhibit will you point out the same thing and answer the same questions with reference to that exhibit? A. Almost the same comments that I made on the Sears garment are applicable to this garment because the only deviation from this and the other one roughly is that the Sears garment starts just a little bit further to the left and swings just a little bit more to the inside and down, but this is in no way compared to the design of my garment, mechanically it can't possibly read on my claims.

Q. Well you say no way, if anybody reads the record they won't see the garment on. So point out the differences.

Judge Druffel: Well it could be read in connection with it so anybody that reads the record is going to refer to the——

Judge Marx: Exhibit?

Judge Druffel: Sure.

Judge Marx: Well he completed his statement.

A. The slide fastener does not terminate underneath a collar——

Judge Druffel: Well you said that?

The Witness: Oh, did I?

Judge Druffel: Yes, I think you did.

Q. Have you got a large underflap there? A. Oh yes, this is a special type chest protector underflap which buttons underneath the opposite side underneath, and is completely different structurally from the Tailspin garment. It also has an extra tab under the collar for security purposes, I presume.

Q. I believe the next two exhibits were the two Baltimore jackets, which I believe except for the fact that one's lined and the other is unlined are the same. I'll just hold those up, because I think I've grown too big to wear them. A. Well from a design standpoint it's obvious that this slide fastener runs in an opposing angle to mine in the first instance, and in the second instance it starts to the right of the collar, and comes toward the center and then straight down vertically, which means that if this garment were worn with a coat this part of the garment would give a blemished appearance.

From a mechanical standpoint, it is not readable upon my claims because the upper extremity of this zipper does not start underneath a collar point. The shapes of the fronts do not conform with the claims in my patent, and it doesn't, wouldn't have the same mechanical, achieve the same mechanical results as mine.

Q. When worn under a coat would the zipper show? A. I expressed my opinion that if worn under a coat the front of this garment would be blemished, due to the position of this zipper.

Q. The witness was referring to Exhibit U-7 and I believe U-8, is the same. A. No I prefer to tie this up to U-8.

Q. All right. A. U-8 is a trifle different, whether it is merely a commercial accident or not, I don't know but the zipper does start underneath the left collar, under the edge of the left collar point on this one, but the slide fastener runs at a contrary angle to zipper in my patent. It would be exposed if it were worn with a coat. From a mechanical standpoint I can't see that it would read on my patent, because the shapes of the fronts are entirely different, and it wouldn't perform the same mechanical functions.

Q. The next Exhibit I believe was V like in Victor, Number 4, which is a professional short-sleeved jacket. Will you answer the same question with reference to that? A. Right off the bat the collar appearances are no where near related. Number one, the slide fastener starts at the center of this garment. It's true that it does go to the right side, but it has no collar, it has a standup type of collar, the upper terminus of this zipper is not under either point. From a mechanical standpoint it can't possibly be read on my claims, from the very first fact that it has no collar, secondly that the zipper starts right in the center of the garment, which is a distinct difference from my garment, and this.

Q. Where does it terminate? A. This zipper terminates all the way at the hem of the garment, whereas mine terminates about six to eight inches, depending upon the size of the shirt, from the lower part of the garment.

Q. How is the zipper concealed? A. This zipper is concealed by a fly, and secondly the zipper runs the full length of the garment, instead of only a partial length.

Q. How is the fly fastened? A. How is the fly fastened?

Q. At the neck, yes? A. The fly is fastened in in the conventional manner——

Q. I don't mean how it's sewed in I mean how is it zipped closed? A. There's a securing device up here in the way of a snap, covers the slider.

Q. When you come to that how about the mechanical? A. That's what I was just talking about.

Q. Now I'll next show you V-5, which I'll ask my colleague Mr. Slutz to put on so the Court can see this. A. I don't think there is any question here about the design standpoint. The zipper starts at the side of the neck, hangs

toward the armhole in a curved direction, and then runs almost vertical down. It has no collar, stand-up type of collar which is buttoned on the side instead of having a front opening of any kind. From a mechanical standpoint it can't possibly read upon my claims, first of all from the position of the zipper which is entirely unrelated, secondly the garment closes at the side instead of from the center of the collar. It has no collar, this aperture at the bottom of the garment is similar to mine but it doesn't have the same length zipper or shape zipper as mine.

Q. Is that a tucked in shirt, at all? A. I would say that that is to be worn on the outside, all the time.

Judge Druffel: It's a professional garment.

The Witness: Yes sir.

Judge Marx: I was going to say humorously he looked like Dr. Kildare.

Judge Druffel: Well suppose we take a recess at this time.

(Short recess.)

Judge Druffel: All right, shall we have further rebuttal?

Judge Marx: I think we've covered all the exhibits didn't we?

You may cross examine.

CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Brohard, without going over all of these patents in detail, you will agree, will you not that your garment is not the first one that had a diagonal zipper on it? A. Before I'll agree with that you'll have to show me one of the patents that has a diagonal zipper.

Q. Well didn't the Wallace patent have a diagonal zipper? A. Is that the Wallace patent?

Q. Yes. A. The Wallace patent has two diagonal zippers.

Q. All right you said it has a diagonal zipper just now. A. No it has two.

Q. Well it has one on one side and one other doesn't it? A. I agree.

Q. And you will agree would you not that your garment is not the first one in which the zipper ending finishes up under the collar, will you not? A. True.

Q. And you will agree will you not that your garment was not the first one that had an open flap below the end of the zipper, will you not? A. True.

Q. I understood that in describing these patents you said that you had considered the figures but that you had not studied the specifications in detail, is that true? A. Only of my own.

Mr. Horton: I think that's all.

Judge Marx: We'd like to call Mr. Freeman for a few questions.

Mr. Horton: I don't know what he's calling him for, I think that an attorney of record ought not be called by opposing side unless it's a——

Whereupon,

Earl Freeman

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT REBUTTAL

By Judge Marx:

Q. Will you state your name? A. Earl Freeman.

Q. And your residence. A. 1342 Greenleaf, Chicago, Illinois.

Q. And your profession? A. Attorney.

Q. Are you one of the attorneys for the Spectator Sportswear Co., Inc.

Mr. Horton: I object to that, it's immaterial, Your Honor, and——

Judge Druffel: Where does the rebuttal come in?

Judge Marx: The claim that they are making that there isn't any novelty in this type of design.

Mr. Horton: And the patents which have been offered in evidence are documentary evidence which speak for themselves on it, certainly what Spectator, I don't know what he may ask here but certainly whatever Spectator has done or whatever Spectator may have done is not material in this case. Spectator is not a party and certainly——

Judge Druffel: Where where does the rebuttal come in?

Judge Marx: It's proof that Spectator, in our opinion, regard it as being novel.

Judge Druffel: I didn't understand what you said.

Judge Marx: That Spectator have admitted by their application to patent an identical garment that there is novelty in this invention as against the very patent which has been introduced in evidence here.

Mr. Horton: Well in the first place, Your Honor, that's strictly contrary to law. The law is directly to the contrary but that is not an admission of any fact. Secondly this man, whatever he may know, as to Spectator patent applications, is certainly privileged and secret knowledge on his part which Spectator certainly has the right to claim. Thirdly, Spectator is not the party defendant in this case and any admissions which they may have made would not be binding upon this defendant.

Judge Druffel: Well assuming that it were so I don't see how it would help prove or disprove the issues in this case.

Judge Marx: I haven't asked him the questions yet.

Judge Druffel: Well you told us what you want, that's the thing.

Judge Marx: What I want to ask him is this, whether Spectator Sportswear, Inc., whether he as their attorney, or one of their attorneys, has not filed an application for a patent on the Corsair shirt, similar to the one produced here in evidence as Exhibit 1.

Mr. Horton: I would object to that as immaterial and irrelevant, it is privileged and secret matter and is not bearing upon the issues in this case.

Judge Druffel: Objection will be sustained.

Judge Marx: There is nothing secret as to whether they have filed it, they have advertised to the world that they have filed it.

Judge Druffel: Well the objection will be sustained.

Judge Marx: Well we will make an offer of proof that the witness if permitted to answer would say that they have.

Judge Druffel: Would that be your answer?

The Witness: What is the question?

Mr. Horton: If Your Honor please if, this goes a little farther than that, suppose he were to answer entirely about the patent application, what the application would show and what it claims, would have to appear from the patent application itself. The mere fact that they filed a patent application wouldn't prove anything.

Judge Druffel: Well the only thing is now Judge Marx is going to assume to say that if he were permitted to answer his answer would be, something, I don't know what you are going to say, that they did make an application, and,——

Mr. Horton: Unless the offer of proof would be as to what the patent application is and what it claims and what

it is, it would be an improper offer of proof, and so far as those facts are concerned why certainly it would be immaterial and certainly privileged and secret.

Judge Druffel: Well I think the limit of your offer could be the fact that on one of the Corsair ads it said Patent application pending, or something like that.

Judge Marx: It says application for design patent as I read it.

Judge Druffel: Well all right, whatever it says.

Q. Well has the Corsair, has the Spectator Sports wear, Inc., filed an application for a design patent?

Mr. Horton: And I make that objection, Your Honor.

Judge Druffel: The objection will be sustained.

Judge Marx: And we offer to prove that if permitted to answer that he would say that there had.

Mr. Horton: Well I submit that the offer is improper. Not relevant to this case.

Q. Well the next question is, what was the date from, upon which you made that application?

Mr. Horton: Of course that objection is made.

Judge Druffel: The objection will be sustained.

Judge Marx: And we offer to prove that if permitted to answer he would state that the date upon which the application was made was subsequent, that is after, the appearance upon the market commercially, and after the issuance of our patents.

Mr. Horton: I object to the offer of proof.

Judge Marx: It was after the appearance upon the market commercially of the patented shirt and manufactured by Cavu and after the granting of the patents to Mr. Brohard, and after the filing of Brohard's application.

Judge Druffel: Well is that an assumption or do you have evidence to support it?

Judge Marx: We have the date of the advertisement.

Judge Druffel: Well I know you have the date of the advertisement, of course the point is that if they make that offer it is up to counsel to ask the questions. You say you have no evidence to support it other than this——

Judge Marx: We expect the witness to make that answer in view of the date of the publication. And my colleagues advise me that they can also tell from serial numbers.

Judge Druffel: Well is there a serial number on it, I didn't see that there was a serial number.

Judge Marx: Yes, there is a serial number on it.

Would your Honor give us the serial number, if you can read it?

Judge Druffel: Here it is. Patent Applied No. D-140345.

Judge Marx: And this patent of Mr. Brohard's there is a considerably earlier serial number, was filed December 23, 1944, and bears Serial Number D-117055.

Judge Druffel: Well that's what you claim his answer would be if permitted to answer?

Judge Marx: Yes.

Judge Druffel: All right. Is that the extent now of the——

Q. I'll show you Exhibit 16, and ask you if you don't know as a fact that this advertisement appeared in Men's Wear Spring-Summer Issue, March 12, 1948?

Mr. Horton: I object to it as repetitious. Some witness has already testified to it, and I object to calling on him as a party for this examination, for this kind of examination.

Judge Marx: Well will you admit that it did appear on that date?

Mr. Horton: Will I?

Judge Marx: Yes.

Mr. Horton: Well you can see it.

Judge Marx: Then you will.

Mr. Horton: Well I would say that the ad looks genuine and it probably is true, I don't know who put the figure on there, maybe Mr. Freeman. Maybe Mr. Freeman knows.

The Witness: I've never seen this before.

Judge Druffel: Well it was introduced by Mr. Fenton it's in the record.

Judge Marx: Well it's only the date, the exhibit's introduced and I just wanted to question later on about the date on which it appeared.

Judge Druffel: Well are you finished with this witness now? Is that the extent of the rebuttal?

Judge Marx: That's all.

Judge Druffel: Now we've reached the point where we want to talk about the record.

Judge Marx: My colleague suggests that in case there may have been some exhibits identified and not finally offered in evidence that we now offer or reoffer all those exhibits that were identified.

Judge Druffel: Well that goes for both sides. The exhibits that were offered for identification are to be considered as offered by either side.

(Plaintiff's and Defendant's Exhibits not previously offered, were received in evidence at this point.)

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DEPOSITION OF SUE S. DAUSER

Taken on behalf of plaintiffs at San Diego, California, January 17, 1949.

APPEARANCES:

For the Plaintiffs,

ZUGELTER & ZUGELTER;
NICHOLS, WOOD, MARX & GINTER,
By MR. A. B. BOWMAN,
San Diego, California.

For the Defendant,

HINKLE, HORTON, AHLBERG,
HANSMANN & WUPPER;
FREEMAN & FREEMAN,
By MR. FREEMAN.

BE IT REMEMBERED that, pursuant to Notice of Taking Deposition hereto attached, and on the 17th day of January, 1949, at Room 7 of the Courthouse, Front and Broadway, San Diego, California, before me, R. B. Whitcomb, a Notary Public in and for the County of San Diego, State of California, personally appeared SUE S. DAUSER, witness produced on behalf of the plaintiffs in the above-entitled action now pending in the said court, who, being by me first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bowman:

Q. State your name. A. Sue S. Dauser.

Q. Your age? A. Sixty.

Q. Your residence? A. 7134 Hybeth Drive, La Mesa.

Q. Your occupation? A. Navy nurse, retired.

Q. How long have you been retired? A. April, 1946.

Q. Prior to that time where were you in the service? A. In the service?

Q. Yes. A. The last seven years I was in Washington, D. C., the last seven years of my service. Before that I had my regular tours of duty, which means changing stations every two or three years.

Q. State your qualifications as a nurse. A. I am a graduate registered nurse of the State of California.

Q. How long? A. My registration was in 1914, and then I entered the Navy in 1917.

Q. What has been your experience as a nurse and in what capacity? A. The first three years after I was a registered nurse was in the operating room work of California Hospital, and then from then on it has been Navy experience entirely.

Q. Were you a nurse during the first world war? A. Yes.

Q. During the full period? A. Yes. I entered the Navy in 1917. I have been in ever since.

Q. Were you a nurse in the second world war? A. Yes.

Q. And during what period, during the whole period? A. Yes. I haven't been out of the Navy since 1917.

Q. What were your particular duties during the second world war? A. The administration of nursing service in the United States Navy.

Q. What were your duties under that occupation? A. It covered all phases of nursing activity for the whole Navy. That was the appointments, the enrollments, the assignments, all facilities that had to do with taking care of patients.

Q. What was your title? A. Superintendent of the Navy Nurse Corps, with the rank of Captain, U. S. Navy.

Q. Did you during the second world war at any time hear of a flight jacket, flight blouse or shirt, to be adopted by the Navy? A. It was our task to adopt one.

Q. You say "our task." State who you mean. A. I was in charge of the office of the Navy Nurse Corps, and our office was assigned to investigate and to confer and to give our recommendations.

Q. For a——A. For the adoption of a flight nurse uniform.

Q. That included what? That uniform included a blouse or what? A. It was a blouse and slacks and coat—jacket, blouse jacket and slacks.

Q. Who assisted you in this selection, as you call it? A. Informally, it was all of my assistants, being the various other officers who had charge of the departments in the Nurse Corps office, such as the enrollments, the qualifications, the assignments, the transfers, the operations.

Q. Did you adopt one during the second world war and state as near as you can when you adopted this. A. Yes. After much consultation with all suggestions and presentation of different models and ideas, we finally decided on the one that has the zipper front. That was presented by Cavu. That was the blouse. That did not have the other parts. It was a blouse separate from the rest of the uniform.

Q. They did not sell anything but the blouse? A. That is right.

Q. Would you describe as much in detail as you can this blouse, particularly the front portion of it, the neck. A. It has a straight shirt collar, and just a little off of the center it is the beginning of the zipper that goes slanting across the chest, and under this zipper it has a flap that extends over and under the opening. That was the main part, the one outstanding part different from other blouses.

Mr. Freeman: I move that the last sentence be stricken as not responsive to the question.

Q. Will you state now what were the principal reasons for adopting this particular blouse over those theretofore known?

Mr. Freeman: I object to the question on the ground that it does not go to the patentability of the shirt, the blouse, rather, that it does not go to the question of invention, but merely to the desirability.

Q. All right, answer the question, please. A. The first thing that attracted us to it was it was smart and good looking. Then on further inspection we found that it was quite, I would say versatile because it could be opened and yet not expose the person's throat as decidedly as would an ordinary shirt, as all the other shirts, blouses, rather, I guess I had better say, we called them shirts. It was so that it would protect against extreme cold and also would adapt itself to coolness if it had to be opened in warm temperatures.

Q. Did you attribute that to its construction? A. Yes, I think so, at least it appeared to us that way.

Q. Did you have the final say on this? A. We had the final say in that our recommendation was usually accepted by the regular board that was in charge of all uniforms.

Q. Who did finally—— A. It was the uniform board, the regular board assigned to do that.

Q. Where is that located? A. The Navy Department, Washington, D. C.

Q. Was this finally adopted and used? A. Yes.

Q. It was used for how long? Could you tell us about how long it was used? A. It was used for the rest of the war, and it would still be used if we have any more need for it.

Q. I will show you a garment here and ask you if you can identify it. A. This is the shirt—this is the blouse we looked at.

Q. Is there any difference at all, would you say, from that and the one you adopted? A. No. I see no difference, except perhaps I do have a vague remembrance that they had this waterproofed, they had the pocket waterproofed.

Q. The inside of the pocket? A. It was waterproofed—no. This was also a feature. This was a very common feature in many blouses, fitted over the hips so as not to give any bulk over the hips.

Q. That was common? A. Yes, that comes in many shirts.

Mr. Bowman: I wish to present this as an exhibit. I think we had better mark this Plaintiff's San Diego Exhibit 1.

Mr. Freeman: I object to the introduction of that blouse into evidence on the ground that the witness testified that it is not the same shirt that the Navy adopted.

A. Did I say it wasn't?

Mr. Freeman: You mentioned the pocket.

Mr. Bowman: The difference you have pointed out is the pocket.

A. Yes, that is the only thing I can remember.

Q. The lining of the pocket? A. It was given as a point, as a good asset in aviation.

Q. The rest of the garment including the collar, the front portion, the zipper on the bias, and the position of the zipper relative to the collar and the front are all the same? A. Yes. They are all the same, yes.

(The garment was marked Plaintiff's San Diego Exhibit 1 by the Notary.)

Q. Are you in a position to know whether or not there has been any beneficial results in the use of this by the

nurses since it has been adopted, over the garment heretofore known and used?

Mr. Freeman: I object to the question on the ground that the witness has not qualified herself as to judging the advantages or benefits of that shirt over the other blouses. I further object and move that all of the witness's testimony with reference to the advantages of the Cavu blouse over the other blouses be stricken on the ground that the witness is not qualified to discuss or to know that matter.

* * * * * *

Q. In your position as Captain and in your position as a nurse, what were your particular duties? A. I was responsible for the whole administration as to whether things were clearly desirable, needed correction or addition. My office had to take into consideration all reports and all conditions in so far as what would need to be corrected, or there should be further investigation, or improvement, in the whole service, both hospital nursing and also flight nursing. If a thing was not satisfactory it was my office that had to look into it and see——

Q. Where did your authorization come from, what department? A. Authorization?

Q. Yes, the authorization for your position, where did it come from, what department? A. The appointment comes from the Secretary of the Navy. My appointment was made by the Secretary of the Navy recommended by the Surgeon General who is Chief of the Bureau of Medicine and Surgery.

Q. And the location where you operated, where was that? A. It was at headquarters, Navy Department, Washington, D. C.

Mr. Bowman: You may cross-examine.

CROSS EXAMINATION

By Mr. Freeman:

Q. Captain Dauser, your statement you have been a graduate registered nurse since 1914, is that correct? A. Yes.

Q. In other words, practically all of your life you have studied nursing? A. Yes.

Q. Have you ever had any experience in the manufacture or the sale of ladies' blouses or men's shirts? A. Not in the manufacture.

Q. You have had experience in the selling? A. No.

Q. Have you ever made any study or examination of shirt styling or designing? A. Slightly, to the extent of what we had to do in respect to our uniform.

Q. What did that slight study consist of? A. Of course, we had to study and look into all phases of the uniform when we went into the war. This was the regular uniform, not the flight uniform. And we had to give it a great deal of thought and consideration because we were expecting 11,000 women to be dressed alike. We had to think of all phases in it. That was my experience with clothes in trying to decide.

Q. About how long a period did that experience cover, Captain? A. The best of a year before we actually decided on the uniform for the Corps.

Q. When was this Cavu blouse adopted for use by the Navy? A. This one must have been adopted about some time in 1944. I believe it was 1944. We adopted the other uniform, the regular nurses' uniform, in 1942. It was about a year to a year and a half after that we began to have flight nurses.

Q. You stated on direct examination that you personally did not have the final authority to select that garment. Who did have that authority? A. The Uniform Board. The Board that was assigned to it.

Q. What did that board consist of? A. Officers in the Navy. This particular one was the Uniform Board of Naval Aeronautics, and there were certain assigned officers who served on this board.

Q. You stated that your department merely made recommendations to this board? A. That is right.

Q. How many persons in your department were connected with the selection of this garment? A. You mean that were connected with giving their opinions on it?

Q. Yes. A. Well, there was the Chief of Medicine, of Air Medicine, and his assistants, and then also the Chief of Medicine and his assistants which was four doctors, then there must have been about six of the nurse officers in my department that had enough influence to be considered.

Q. Captain Dauser, did you personally make a study of the blouses that were presented to the Navy? A. The same as we did with this one.

Q. You didn't answer my question. A. Yes. We studied them. We went into all of their points.

Q. I asked you whether you personally made a study of the other blouses. A. Yes, indeed. They were in my office. You could see blouses all over my office.

Q. What other blouses were presented to you during your selection of the Cavu blouse? A. I couldn't give the names now.

Q. You don't remember the names of any of them? A. No. I had nothing to do with the final business and ordering. We just took the models as they were presented.

Q. Did you at any time make a study of the various blouses on the market that were not presented to you? A. No, we didn't feel that necessary. We had so many presented by so many firms presenting them.

Q. Captain Dauser, did you know that there were other blouses having diagonal zippers on the market at that time? A. No, I didn't know. I didn't see any of them.

Q. Did you know that the Angelica Jacket Company made a diagonal zipper jacket and a side zipper jacket in 1941? A. No.

Q. Were you familiar with the Birger-Ruüd Ski Jacket made by the Fox-Knapp Manufacturing Company in 1939? A. No.

Q. Were you familiar with the Airman's Stratomaster Shirt made by the Shirt-Craft Company in 1941? A. No.

Q. Did you prior to your recommending the Cavu blouse make any study of the Patent Office files to determine the types and designs of blouses there? A. No.

Q. I hand you Plaintiff's San Diego Exhibit 1 and will you state what advantages that would have over a shirt having the zipper straight down the center of the shirt? A. When it is open, the zipper straight down would expose your chest. That would be the first thing you would notice. This of course protects the chest even if you did loosen it.

Q. When that is open doesn't that expose the chest? A. No. Now you will find if a wind would hit that or something it would do that, no matter how far down it would be.

Q. Would the wind do the same thing to a straight zipper? A. No. If you would have a straight zipper down here that would open. We were convinced that this

did not open and expose your chest as readily as it did with the type of shirt that our regular Navy nurse's uniform had because that was one that was up or opened down the front, whichever way the order was to wear them.

Q. However, if it were cold and if it were desirable that the chest be not exposed, any closed shirt, wherever that zipper was, would protect you, wouldn't it? A. Yes.

Mr. Freeman: That is all.

REDIRECT EXAMINATION

By Mr. Bowman:

Q. The air striking against this with the zipper in that position, that is in Plaintiff's San Diego Exhibit 1, on the angle from the collar, the wind striking that would have a tendency to close it to a certain extent? A. Yes.

Q. And if the air from a propeller of the airplane would blow against it, it would have a tendency to close it if it were partially open, is that so? A. Yes.

Q. What effect does the tip of the collar relative to the angle of this have on that also? A. Well, it gives the feeling that it would help cover it in closing it under the collar. The tip of the collar is beyond the opening.

Mr. Bowman: That is all.

RECROSS EXAMINATION

By Mr. Freeman:

Q. Would it protect any more than if that zipper were straight down the center when it was closed, Captain? A. You would have the same protection if you had it closed like this, yes. That would be the same if you had it closed up to the neck.

Q. Any shirt that was open in the front, receiving a gust of wind in certain places would have a tendency to close the collar, wouldn't it, Captain? A. Not as completely—You mean if it were open down the front?

Q. Yes. A. Not as completely as this would.

Mr. Bowman: The witness is testifying about Plaintiff's San Diego Exhibit 1.

Q. Captain, was the fact relative to the closing of the shirt from a gust of wind one of the primary factors that led you to recommend that shirt? A. Well, it convinced us of a very good point in favor of the shirt.

Mr. Freeman: That is all.

Mr. Bowman: That is all.

/s/ SUE S. DAUSER.

SUBSCRIBED and sworn to before me at San Diego, California, this 20th day of January, 1949.

/s/ R. B. WHITCOMB,
Notary Public in and for the County of San Diego, State of California,

My Commission Expires July 8, 1941.

(SEAL)

* * * * * *

The depositions of LOUIS KARGER, ANNEBELLE WRIGHT, and LILLIAN LEVY, taken on behalf of the Defendant pursuant to notice hereto annexed, at the office of Angelica Jacket Co., 177 North Michigan Avenue, Chicago, Illinois, before Peter V. Kuhn, a Notary Public in

and for the County of Cook and State of Illinois, beginning at 10:00 o'clock A. M. on Tuesday, December 7, 1948.

APPEARANCES:

ZUGELTER & ZUGELTER,
1710 First National Bank Building,
Cincinnati, Ohio, by
GERALD B. TJOFLAT, ESQ.,
and
NICHOLS, WOOD, MARX & GINTER,
900 Traction Building,
Cincinnati, Ohio, by
LEONARD D. SLUTZ, ESQ.,
Appearing for Plaintiffs;

HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER,
Suite 2300, Board of Trade Building,
Chicago, Illinois, by
WARREN C. HORTON, ESQ.,
and
FREEMAN & FREEMAN,
One North LaSalle Street,
Chicago, Illinois, by
EARL FREEMAN, ESQ.,
and
CUSHMAN, DARBY & CUSHMAN,
American Security Building,
Washington, D. C., by
JOHN J. DARBY, ESQ.,
Appearing for Defendant.

* * * * * *

Louis Karger,

called as a witness on behalf of the Defendants, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to oral interrogatories propounded, deposed and testified as follows:

DIRECT EXAMINATION

By Mr. Horton:

Q. What is your full name, please? A. Louis Karger.

Q. And where do you reside? A. In Chicago.

Q. What is your occupation? A. Sales manager and general manager, Chicago office Angelica Jacket Company.

Q. Are you an officer of Angelica Jacket Company? A. I am.

Q. What office? A. I am vice president.

Q. Where is the main office of Angelica Jacket Company? A. St. Louis, Missouri.

Q. And is the factory located in St. Louis? A. It is.

Q. How long have you been employed by the company? A. Approximately 16 years.

Q. Now, during that 16 years what portion of it have you been with the Chicago branch? A. The entire portion.

Q. What, in general, is the business of Angelica Jacket Company? A. Manufacturing of washable service garments.

Q. Would it be true to say that the business is making uniforms, and selling uniforms also? A. Yes; by service garments, that is what we mean, uniforms; primarily uniforms, but we call them service garments.

Q. Just generally, where are those garments used? A. They are used in hotels, hospitals, factories; in fact, by anybody that does any professional work of any kind where they are of service to the public.

Q. Do you make such garments for use by doctors, dentists, nurses? A. We do.

Q. Beauty parlors? A. Yes.

Q. You were employed by the Angelica Jacket Company, at the Chicago branch, in 1940, 1941 and 1942? A. Yes, sir.

Q. And how long have you been manager of this branch? A. Three years.

Q. Before you were manager, was the branch office your headquarters? A. Yes, sir.

Q. Are you familiar with the catalogs which have been published from time to time by Angelica Jacket Company? A. Yes, sir.

Q. Do you keep the catalogs in your files, of the Angelica Jacket Company? A. We do.

Q. I ask you whether you have and can produce a professional apparel catalog issued in 1941? A. I can.

Q. And will you please produce that? A. Yes; this is it. (Handing to counsel.)

Mr. Horton: I ask that that catalog be marked for identification as Defendants' Exhibit 1.

(Defendants' Exhibit 1 marked for identification by the Reporter and Notary.)

Mr. Horton: Q. Now, will you examine Defendants' Exhibit 1 for identification and tell me what it is.

The Witness: This is a professional apparel catalog printed for Angelica Jacket Company in 1941, containing apparel sold to doctors, dentists, and hospitals, and people of a like nature.

Q. Do you know when that catalog, Exhibit 1 for identification, was received at the Chicago branch? A. I don't know exactly, but it would have to be delivered to us not later than January of 1942.

Q. On the inside cover page that contains a stapled-in priced list, does it not? A. That does.

Q. And what is the date on that price list? A. March 10, 1942.

Q. Do you know whether the catalog was received by your branch office prior to receiving the attached price

list? A. It could have been received by us prior to the price list.

Q. Does that price list have any effective date, for going into use? A. The price list only denotes prices on the styles that have taken place in this catalog; its a formal price list which was used to be sent to all customers. Previous to receipt of that, we had prices issued to us by the factory; so that the catalog could have been used previous to the printed date of the price list.

Q. Do you knew whether it was so used? A. I couldn't swear to it at this time, without further thought on the matter. It could have been used, due to the fact that the styles were submitted to us previous to the printing of the catalog.

Q. And your recollection goes to the styles, is that right? A. That's right.

Q. Do you know whether catalogs like Exhibit 1 were distributed to customers of the Angelica Jacket Company? A. Yes, they were.

Q. Did you distribute any such catalogs yourself? A. Yes.

Q. Now calling your attention to page 4 and page 5 of that catalog, has your company sold the garments illustrated on those pages? A. We have.

Q. Can you state when was the earliest time, to your recollection, that the two zippered garments illustrated on those two pages were sold by Angelica Jacket Company? A. We have documentary evidence in the form of invoices.

Mr. Slutz: Object to the answer to that question. The question was, what is the earliest date, to your recollection.

Mr. Horton: He has not finished it yet.

Mr. Tjoflat: The answer is not responsive to the question.

Mr. Horton: It might be, if you let him finish it.

Mr. Tjoflat: I move that the answer be stricken.

Mr. Horton: Q. You just go ahead and answer, Mr. Karger.

The Witness: We have documentary evidence that these garments were sold in 1942.

Q. And how does your recollection agree with that date and the date of sale? A. My recollection is coincident with it, because I know garments were——

Mr. Slutz: Object to the question, as leading.

The Witness: (Continuing) ——sold at that time. These garments were offered for sale the moment the catalog was in our hands.

Mr. Horton: Q. Now, in the course of your business do you keep records of sales made by your company? A. We do.

Q. And the sales made in this branch? A. We do.

Q. What is the nature of those records? A. They are invoices—they are the orders received from the customers, from which the information is transmitted in the form of invoices to the customers for merchandise purchased.

Q. What do you do with those invoices that you make up? A. We file them; after we send the original to the customer, the others are filed in the various places, according to our system.

Q. Do you make carbon copies of them when you make up those invoices? A. Usually five carbon copies are made, and one original.

Q. And where does the original go? A. The original goes to the customer.

Q. Where does one of the carbons go? A. A duplicate goes to our stock record department, and one copy goes to the manufacturing department; the third copy goes

into the office files; the fourth copy goes into the manufacturing files; and the fifth copy, I believe, goes to the general office.

Q. How long do you keep those invoices in your branch office files? A. Approximately five years.

Q. Are those invoices numbered serially in any way? A. They are.

Q. Have you had a search made for the production of invoices relating to these garments shown on pages 4 and 5 of Exhibit 1 for identification? A. We have.

Q. That is, the garments of the zippered type there illustrated? A. That's right.

Q. And have you located some of those invoices in your files? A. We have located five or six, showing sales of these two styles of garments.

Q. I hand you a group which you handed to me, and ask you what those are? A. These are copies of invoices mailed to various customers, in various sections of the country, who purchased the two styles mentioned, carrying diagonal closing zippers.

Q. And where did you obtain those copies you have in your hand? A. From our files.

Q. Is that the file copy of the invoice to which you referred? A. These are our office file copies.

Q. Now, you have one bearing serial number 121719; can you state what garment was sold, as shown by that invoice? A. That is a diagonal closing zipper, high neck jacket, usually used by dentists or doctors.

Q. Now, on page 4 of the catalog, Exhibit 1 for identification, there is shown an illustration of a garment marked 41TDS29; and on the invoice which you have referred to, those numbers appear; can you state whether those numbers correspond?

Mr. Slutz: Objection to the leading form of the question.

The Witness: A. They do.

Mr. Slutz: I move that answer be stricken.

Mr. Horton: Q. What are those numbers? A. The style number is 41TDS29, two jackets, size 42.

Q. Are each of the jackets in this Exhibit 1 actually given a style number? A. They are.

Q. That is, the style number of the zippered jacket shows on page 4?

Mr. Slutz: Object, on the ground that the document is the best evidence, and speaks for itself.

The Witness: A. The style number is 41TDS28 and 41TDS29.

Mr. Horton: Are those the numbers you yourself saw as descriptive of such garments, the numbers you used as descriptive of such garments in making up your bills and invoices? A. They are.

Q. Now, calling your attention to page 5 of the catalog, Exhibit 1 for identification, there is there shown a zippered jacket; and I ask you what style number is used for that jacket by your company?

Mr. Tjoflat: Object to that question; object to the designation zippered jacket.

Mr. Slutz: And object further on the ground that the document speaks for itself.

Mr. Horton: I don't think I asked him what the document said; I asked what style number was given to them.

Mr. Tjoflat: You used the term "zippered jacket"; I object to the term "zippered jacket."

Mr. Horton: You will agree it is a zippered jacket, won't you?

Mr. Tjoflat: Let the witness testify.

Mr. Horton: Q. Mr. Karger, referring to the jacket illustrated at the left on page 5 of catalog Exhibit 1 for

identification, what is the style number which your company gives the jacket?

The Witness: A. Style number 377.

Q. Is that jacket a zippered jacket?

Mr. Slutz: Objection.

Mr. Tjoflat: Object to the question.

The Witness: A. That is.

Mr. Horton: Where the catalog says that it opens diagonally down front with concealed zipper, is that statement true? A. That statement is true.

Q. Now, do you have any invoices showing sales of jackets number 377? A. I have.

Q. You have produced an invoice, serial number 127387, have you not? A. That's right.

Q. And what date does that bear? A. May 25, 1942, shipped to the customer on May 27, 1942.

Q. Up in the righthand corner there is date, 5/25/42; what does that date mean? A. The date of the customer's order.

Q. Below that date there appears the date—no, I beg your pardon; it is not a date. The other date on there is 5/26/42; and what does that date indicate? A. That is the date on which the order was received and written up.

Q. Will you look at each of those invoices which you have in your hand, separately, and state by serial numbers of invoices the kinds of garments which are indicated as sold by each of those papers?

Mr. Slutz: Object, on the ground that the document is the best evidence; it speaks for itself. We are referring to unidentified documents, that presumably are self-explanatory.

Mr. Horton: Q. Now, take the first one, invoice bearing the number 127387; what garments are listed in that invoice?

Mr. Slutz: Object to this question, and to all other questions relating to unidentified documents.

The Witness: A. Invoice 127387 shows an invoice containing two garments that had diagonal zipper closings; one is style 41TDS28, and the other one is style 377, both of which appear on this invoice.

Mr. Horton: Q. Referring to the next invoice, serial number 121873, what does that show? A. That invoice shown one garment with a diagonal zipper closing, number 377.

Q. Referring to the next invoice, serial number 130780, what does that show?

Mr. Slutz: Let the record show that we object to the questioning on these so-called invoices, until they are identified in the record.

The Witness: A. This invoice also shows one style 377 garment.

Mr. Horton: Q. The next invoice, serial number 129690, what does that show? A. That shows our style 41TDS28 side zipper opening garment, on which we have replaced the zipper.

Q. Attached to that there is a white slip; what is that white slip? A. That is a record of the return of the garment, which was the customer's property, and on which he wanted a zipper replaced.

Q. Referring to the next document, invoice number 00038, what does that show? A. That shows three garments, our style 41TDS28, which are side opening zippers.

Q. Calling your attention to the next invoice, serial number 122933, what does that document show? A.

That shows three garments, our number 41TDS28, which have this side opening zipper.

Q. Attached to that is a white sheet; can you state what that is? A. That is showing the return of two garments which the customer purchased, which were of a different style and which the customer did not want, and for which he asked they be replaced with these zipper opening garments.

Q. Calling your attention to the next invoice, serial number 123239, what does that show? A. That shows three garments, 41TDS28, where we have replaced the original size by a larger size.

Q. And that has attached to it a white sheet, does it not? A. That shows the return of the smaller size, which is to be replaced with the larger one.

Q. Calling your attention to the next invoice, serial number 06542, what does that invoice show? A. That shows two garments, our style 41TDS28, on which the zippers were replaced.

Q. And that has attached to it a white sheet also; what does that show? A. That records the return of the two garments originally shipped with the defective zippers.

Q. Calling your attention to the next invoice, number 121719, what does that invoice show? A. That shows two garments shipped with the side opening zipper, shipped with long sleeves, our 41TDS29.

Q. These invoices which you have are ones which you have kept in the regular course of your business, are they?

Mr. Slutz: Objection to the leading form of the question.

The Witness: A. They are.

Mr. Horton: Q. Do those invoices show the dates upon which the sales or shipments were made? A. They do.

Q. And do they show the name of the party or person or company to whom the goods were shipped? A. They do.

Mr. Horton: I will ask that these invoices be marked for identification as Defendants' Exhibits 2 to 10, inclusive.

(Defendants' Exhibits Nos. 2 to 10, inclusive, marked for identification by the Reporter and Notary.)

Mr. Horton: Q. Who in your office makes up invoices when you sell the goods? A. Well, everyone in our office makes up invoices. You mean bills?

Q. No, I just wondered, when you make a sale or bill an order, someone bills the order? A. Yes.

Q. Someone else, I suppose, makes out the bill; or it may be the same person. A. No, it is all done in one operation.

Q. Just what is the procedure? A. Well, the orders are received and checked in this office by Miss Wright. Then they go to our bill clerk, who makes up all these various copies which are distributed to the various departments.

Q. And were these invoices which you have examined, Defendants' Exhibits for identification numbered 2 to 10, inclusive, invoices so made? A. They were.

Q. Mr. Karger, I show you a cotton garment and ask you, if you can, to state what that is? A. That is our style number 377.

Q. And do you know who manufactured that garment? A. Manufactured at the Angelica Jacket Company.

Q. Is that the garment which is advertised and illustrated on page 5 of catalog Exhibit 1 for identification? A. That is.

Mr. Horton: I will ask that that be marked for identification as Defendants' Exhibit 11.

(Defendants' Exhibit No. 11 marked for identification by the Reporter and Notary.

Mr. Horton: Q. Do you have any personal knowledge as to when that particular garment was made or sold?

The Witness: A. In 1942, this was sold.—You mean this particular garment?

Q. I mean that particular one which you have in your hand. A. No, that I don't know.

Q. When you said 1942, what did you mean by that? A. I meant garments of a like nature had been sold in 1942.

Q. Did the garments sold by you in 1942, of this particular style number, differ in any way from Exhibit 11 for identification? A. They did not.

Mr. Tjoflat: May I ask, what is Exhibit 11 for identification?

Mr. Horton: That is this jacket.

Q. Do you keep jackets of the style number 377 in stock now? A. Not today.

Q. I show you another jacket, and ask you, if you can, to state what that is? A. This is our style 41TDS29.

Q. And do you know who manufactured that jacket? A. Angelica Jacket Company.

Q. Now, is that jacket, of that style number, illustrated in the catalog, Exhibit 1? A. It is.

Q. And when did your company sell such jackets? A. Since 1941 to date.

Q. Is your company still selling that jacket? A. Still selling this jacket.

Q. Now, with respect to the particular jacket which you have in your hand, do you know where that came from? A. This came from our stock, as far as I know.

Q. Do you know when it was delivered from your stock to the customer? A. I haven't the exact date, but I believe it was within the last three weeks.

Q. And to whom was that sold? A. To Mr. Earl Freeman.

Mr. Horton: I will ask that that be marked for identification as Defendants' Exhibit 12.

(Defendants' Exhibit No. 12 marked for identification by the Reporter and Notary.)

Mr. Horton: Q. Mr. Earl Freeman, to whom you referred is counsel for one of the defendants here present, is he not?

The Witness: A. That's right.

Q. Now, were the garments of this style which were made, as you say, from 1941 to date of any different construction than this Exhibit 12? A. They are not.

Q. In some of these styles, do you make them with different length sleeves? A. We make the same style with a three-quarter length sleeve.

Q. And do you make them in different colors? A. We make it in tan, as well as white.—Not in that catalog; it shows in our present catalog.

Q. Mr. Karger, does your branch keep records of the goods ordered from the St. Louis office? A. We do.

Q. And are those records kept in your office in the regular course of business? A. Yes, we do.

Q. Do you have any such records showing the orders for jackets like Exhibits 11 and 12 from the home office, in 1942 or 1943? A. I have two copies dated 1943, by which we ordered two styles with diagonal zipper closings from our factory.

Q. You say those are copies; how were copies and originals made up, and what happens to them? A. These